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Agenda No. 14

Abstract

In the Appellate Court of the
State of Illinois
Second District
May Term, 1944

Clarence Wolfram,	:	
Appellant,	:	Appeal from
	:	
v.	:	Circuit Court of
	:	
Melvin Bennehoff,	:	Stephenson County.
Appellee,	:	

Dove, P. J.:

Appellant brought suit in the circuit court of Stephenson County against appellee to recover damages for personal injuries incurred in an automobile accident on State Highway 75, between the villages of Dakota and Rock City, at about 12:50 A. M. on January 19, 1941. Appellant had gotten out of his stalled car and was struck by appellee's passing automobile. His left leg was broken and he was otherwise injured. The trial was by a jury, which returned a verdict for appellee, judgment was entered on the verdict, and the cause is here by an appeal from the judgment.

The complaint consisted of a general negligence count and a willful and wanton count. The grounds urged for reversal are that the verdict is against the manifest weight of the evidence, and that the court erred in the giving of instructions for appellee. It is particularly urged that the evidence shows that appellee was guilty of willful and wanton misconduct. A special interrogatory on this issue was answered in the negative by the jury. Appellee filed no cross error, and therefore his claim that he was entitled to a directed verdict cannot be considered. He also urges that the verdict is not against the manifest weight of the evidence. This issue necessitates an examination of the testimony.

Appellee claims that the trial court erred in giving the instruction that the jury should not consider the evidence of the appellee's negligence.

Appendix

in the Appellate Court of the
State of Illinois
Second District
May 14, 1934

ALL INFORMATION CONTAINED

CLASSIFICATION

the team

4011 5030 4

TO: JUDGE JAMES L. COOPER

Вопрос: по какой статье

1941

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As a result of the examination of the testimony, the jury found that the defendant was negligent and that the plaintiff was not negligent. The jury also found that the defendant was liable for the damages claimed by the plaintiff. The jury awarded the plaintiff damages in the sum of \$10,000.00. The jury also awarded the plaintiff costs of \$1,000.00. The jury's verdict was affirmed by the court.

#9 The record is in the file

Route 75 is a paved highway, and runs approximately east and west at the place of the accident. Appellant, accompanied by six other persons, was returning to Rockford in his automobile from a meeting of aluminum ware salesmen at Dakota, and was driving easterly on the highway. It was a clear, bright moonlight night, and the temperature was about 10° to 15° below zero. The highway was icy and the pavement had been covered with snow, which had been pushed off of it by a snow plow, so that there was a clear space of approximately four feet wide on each side of the paved portion of the road, with a snow bank two or three feet deep along the south edge of the cleared space. The highway has several sloping hills, and the accident occurred on the incline of one of them. The pavement gutter at that point was filled with ice or snow level with the pavement. Appellant's car had stood out in the cold at Dakota three hours, and when it reached the place of the accident, the motor stalled, and the car stopped on the incline. Appellant testified that it stopped about three feet north of the snow bank, with the left front wheel approximately three feet on the concrete pavement; that Mr. Chapman, one of the passengers, took the wheel, and that he, (appellant) and Mr. Mussey, another one of the passengers got out of the car and pushed it back west so that the right front wheel was approximately six inches from the snow bank; and that the rear right wheel was pushed into it, with the left front wheel clear of or on the south edge of the gutter. The windows of the car were frosted over, with the exception of a cleared space in front of the steering wheel. Appellee's car came from the west, and struck appellant as it went around his car. There was no other car coming for a distance of a half mile in either direction.

Mr. Mussey, a witness for appellant, placed the speed of appellee's car at about 50 miles per hour. Appellant first testified it was going 50 to 60 miles per hour, later said it might have been

Route 75 is a paved highway, and runs approximately east and west at the place of the accident. Appellant, accompanied by his other persons, was returning to work in his automobile in the morning of aluminum were observed - Pickett, and one of the witnesses on the highway. It was a clear, bright moonlight night, and the temperature was about 100 to 120 below zero. The ground was covered with snow, which had been blown off of it by a snow plow, so that there was a clear space of approximately four feet wide on each side of the paved portion of the road, with a snow bank two or three feet deep along the edge of the cleared space. The highway has several openings, and the accident occurred on the incline of one of them. The witness at that point was filled with ice or snow level with the pavement. Appellant's car had set out in the old snow three hours, and when it reached the place of the accident, the motor stalled, and the car stopped on the incline. Appellant testified that it stopped about three feet north of the snow bank, with the left front wheel approximately three feet on the concrete pavement; that Mr. Chapman, one of the passengers, took the wheel, and that he, (appellant) and Mr. Muesy, another one of the passengers got out of the car and pushed it back west so that the right front wheel was approximately six inches from the snow bank; and that the rear right wheel was, pushed into it, with the left front wheel clear of or on the south edge of the gutter. The windows of the car were frosted over, with the exception of a cleared space in front of the steering wheel. Appellant's car came from the west, and struck appellant as it went around the car. There was no other car coming for a distance of a half mile in either direction.

Mr. Muesy, a witness for appellant, placed the speed of appellant's car at about 30 miles per hour. Appellant first testified it was going 30 to 40 miles per hour, later said it might have been

going 40 miles per hour, and finally said he had no idea how fast it was going. There was no contact between the two cars. Appellant testified that the right front fender of appellee's car struck the outside of his left leg, and that just before it struck, he turned quickly to the right, holding his hands in front of his face to protect it from any flying glass. Both of these witnesses testified that appellee's car was swaying on the road as it approached. Appellee, his sister, and Roy Kundert, the other two occupants of his car, testified that it did not skid or sway at any time, either before or after the accident. Appellant further testified that in pushing his car back, he had his left hand on the radiator and his right hand on the left front headlight, with his body just north of the center line of the car, and that when he quit pushing, he stepped back 6 or 8 feet, and stood directly in front of the left head light; that he did not get more than one foot farther north at any time, and that no part of his body got over into the east bound traffic lane of the pavement. On cross-examination he testified that when he stopped pushing the car he was standing several feet south of its north edge; that when he last saw appellee's car it was about 50 feet back of and headed for his car; that as nearly as he could tell the two left wheels of appellee's car were off on the shoulder, and it seemed to him that the cars would hit squarely; that the door of his car was open, possibly 3 to 6 inches, and that when appellee's car was at the bottom of the hill, he, the witness, hollered at Mr. Chapman to close the door, and that he did not run out on the pavement when he hollered.

Mr. Mussey testified on cross-examination, as follows:

Q. "After you and the plaintiff, Mr. Wolfram, quit pushing the car, it's a fact, is it not, that the plaintiff Mr. Wolfram, over there, ran around on the north side of his car and toward the back?"

A. "He started around there, I don't know whether he did or not."

Q. "The answer to the question is 'yes', is it?"

A. "Well, yes."

going 40 miles per hour, and finally said he had no idea how fast
 it was going. There was no contact between the two cars. Appellant
 testified that the right front fender of appellee's car struck the
 outside of his left leg, and that just before it struck, he turned
 quickly to the right, holding his hands in front of his face to
 protect it from any flying glass. Both of these witnesses testified
 that appellee's car was swaying on the road as it approached.
 Appellee, his sister, and Roy Kunderz, the other two occupants of
 his car, testified that it did not skid or sway at any time, either
 before or after the accident. Appellant further testified that in
 pushing his car back, he had his left hand on the radiator and his
 right hand on the left front headlight, with his body just north
 of the center line of the car, and that when he quit pushing, he
 stepped back 8 or 9 feet, and stood directly in front of the left
 head light; that he did not get more than one foot farther north
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 the back?"
 A. "He started around there, I don't know whether he did
 or not."
 Q. "The answer to the question is 'yes', is it?"
 A. "Well, yes."

Q. "And you don't know, Mr. Mussey, whether he got back towards the front of his car or not, do you?"

A. "The last I saw of him, he was up toward the front fender, that was the last I saw of him before the accident."

Q. "But you don't know whether he had regained the front of his car or not before he was struck, do you?"

A. "No."

Q. "You didn't see him struck, did you?"

A. "No."

Q. "You saw him run out on the pavement, did you not, after you and he quit pushing the car back?"

A. "He was on his way back when I last saw him."

He admitted that on the former trial he testified that appellee's car was on the north side of the road. He further testified that he heard appellant holler something, and supposed he hollered to Mr. Chapman to close the car door; that appellee's car was about 75 feet up the road when it started back into the east bound lane and that he never saw it run off the highway.

From the testimony of appellee and Mr. Kundert, it appears that the car had a double defroster and the heater was functioning, so that the windshield was clear except around the edges.

Appellee, who was examined as an adverse witness, also testified that as he approached from the west he was traveling about 40 or 45 miles per hour, and first saw appellant's car about 250 feet ahead, with no lights on it, in the east bound lane, on the south side of the black line, and that prior to the accident he did not see anybody near it; that he did not slacken his speed because he could gradually pull over to the north side of the pavement and pass without any interference, and that he did not sound his horn because he did not think it was necessary; that he turned gradually into the west bound lane and passed on the north side of the black line, with a space of one and one half or two feet between the cars; that as he got even with or a little past appellant's car he heard a click on his fender, but did not notice any bump, and traveled 50 to 75 feet on up the hill before turning over to the south side again;

Q. "And you don't know, Mr. Manney, whether he got back towards the front of the car or not, do you?"
 A. "The last I saw of him, he was up toward the front of the car. But you don't know whether he had regained the front of his car or not before he was struck, do you?"
 A. "No."
 Q. "You didn't see him struck, did you?"
 A. "No."
 Q. "You saw him run out on the pavement, did you not, after you saw him getting up the car again?"
 A. "He was on his way back when I last saw him."

He admitted that on the former trial he testified that Appelbee's car was on the north side of the road. He further testified that he heard Appelbee's car coming, and that he believed to Mr. Chapman to close the car door; that Appelbee's car was about 75 feet up the road when it started back into the east bound lane and that he never saw it run off the highway. From the testimony of Appelbee and Mr. Manney, it appears that the car had a double deflector and the heater was functioning, so that the windshield was clean except around the edges. Appelbee, who was examined as an adverse witness, also testified that as he approached from the west he was traveling about 40 or 45 miles per hour, and that the Appelbee's car about 250 feet ahead, with no lights on it, in the east bound lane, on the south side of the black line, and that prior to the accident he did not see anybody near it; that he did not slow his speed because he could gradually pull over to the north side of the pavement and pass without any interference, and that he did not sound his horn because he did not think it was necessary; that he turned gradually into the west bound lane and passed on the north side of the black line, with a space of one and one half or two feet between the cars; that as he got even with or a little past Appelbee's car he heard a click on his fender, but did not notice any bump, and traveled 50 to 75 feet on up the hill before turning over to the south side again;

that as he went around appellant's car he saw a dark object at the front of appellant's car, north of it in the west bound lane, and got right to the object before he saw it, and that his car struck the object. At the former trial he testified that when he saw the dark object, the first thing he thought was that the door on appellant's car had been left open. Mr. Kundert testified that as appellee's car approached the scene of the accident it turned to the left and was on the north side of the black line; that he looked to the side and saw something black, and after he saw the object and heard a click, appellee's car came back gradually onto the east bound half of the pavement.

Nobody testified that the lights on appellant's car were burning at the time of the accident. A written statement signed by Mr. Chapman a short time after the accident recites that they were then burning, but he did not testify concerning them. One of the witnesses for appellant testified that the battery was dead, but not completely so, and that when they left the car after the accident all the lights were burning. Another one of the salesman who had been at the Dakota meeting, and who passed appellant's car after everybody had left, testified that the tail lights were burning and that the car was off the cement road, to the south side, along the embankment.

After passing appellant's car, appellee proceeded to the top of the hill, turned around in a drive way, came back to the scene of the accident, and with the other occupants of his car, and Mr. Mussey, took appellant to the hospital at Rockford. On the trip to the hospital Mr. Mussey or appellant asked appellee to slow up so the license number of cars they passed could be taken. Appellee testified that he did not think it was of any use to disclose that his car was the one which struck appellant, because he thought it would have started an argument. At his request, Mr. Kundert told Mr. Mussey of it at the hospital.

Mr. Chapman testified that he did not see appellant run along the north side of his car toward the back end of it; that he did not feel a thud on the car, and that appellant was not thrown against it. He admitted that in his deposition before the trial, when asked if anything struck the car, he replied: "Whether it was a breeze of the passing car or something hit the car, you could feel a slight jar, that's all I know about it." The written statement signed by him a few days after the accident recites: "All I know about the accident was from hearing the noise and feeling a slight jar. Mr. Wolfram was thrown against his own car after being struck by the passing car. There was no contact between the two automobiles." Mrs. Edward Mueller, an occupant of appellant's car, testified that on March 3, 1942, she told appellee's counsel that it felt like something hit the car.

Mr. Kundert testified that on the road to the hospital, Mr. Mussey asked appellant: "Why in the world was he over on the other side of the road for; why, man, you were thrown right over the hood of your own car", and that appellant replied that he did not know why; that it happened so quickly he did not realize it was going to come. Appellee's sister testified to substantially the same conversation, except that she said that appellant did not say anything. Mr. Mussey testified that he did not remember making the statement, and appellant denied that it was made.

Mr. Mussey further testified that when appellant's body hit the ground it went 10 or 15 feet in front of his car and lay even with the front left wheel, east and west, with his head up hill. His pipe and pencil were picked up 6 or 8 feet in front of the car. The position of the body immediately after the accident, and the testimony of Mr. Mussey as to appellant's activities and location just prior to being struck, and that appellee's car started turning back into the east bound lane about 75 feet in front of appellant's

A.

Appellee's motion for a directed verdict presented only a question of law as to whether, when all of the evidence is considered, together with all reasonable inferences from it in its aspect most favorable to appellant, there is a total failure or lack of evidence to prove any necessary element of the appellant's case. If there is in the record evidence which, standing alone, tends to prove the material allegations of the complaint, a motion for a directed verdict should be denied, even though upon the entire record the evidence may preponderate against the party in opposition to such motion, so that a verdict in his favor could not stand when tested by a motion for a new trial. (Merlo v. Public Service Company of Northern Illinois, 381 Ill. 300, 311; Todd v. S.S. Kresge Co., 384 Ill. 524, 527.) In passing upon such a motion, the Court does not weigh the evidence or determine its preponderance. In the case at bar, there is a conflict in the testimony as to whether appellant's car was standing on the pavement, whether appellee's car was on the proper side of the road, and as to its speed, and as to whether it was swaying as it approached. These were questions of fact for the jury to decide, and the trial court could not invade the jury's province in that respect. Appellant testified that when he quit pushing his car, the right hind wheel was in the snow bank, the right front wheel was approximately six inches from the snow bank, and the left front wheel was clear of or on the south edge of the pavement; that when he quit pushing, he stepped back 6 or 8 feet and stood directly in front of the left headlight; and that he did not get more than one foot farther north at any time. Although Mr. Mussey's testimony tends to refute appellant's statement that he was never more than a foot north of his left headlight, he also testified that he did not see appellant when he was struck by appellee's car, and that appellant was on the way back when he last saw him. Assuming that appellant had run out, as testified by Mr. Mussey, we think that in view of his other testimony, there was a question of fact as to whether he had gotten back off the pavement when he was struck, which was also a question for the jury to determine. Under these circumstances, it cannot be said, as a matter of law, that there was no evidence tending to support appellant's cause of action, and in our opinion, the trial court did not err in denying appellee's motion for a directed verdict.

Mr. Chapman testified that he did not see any weapons in the car, and that he did not see any weapons in the car.

car, strongly tend to show that in an effort to have Mr. Chapman close the car door, appellant suddenly and negligently ran out onto the pavement into the path of appellee's car. It is fundamental that one cannot recover under a general negligence count if he is guilty of contributory negligence. In our opinion the weight of the testimony does not show that appellee was guilty of any willful and wanton misconduct and we are therefore unable to say that the verdict is against the manifest weight of the evidence under either count of the complaint.

Appellant claims that appellee's seventh given instruction in stating the issues under the first or negligence count of the complaint, and that appellee's 12th given instruction, in stating the issues under the second or willful and wanton count, omit certain necessary portions thereof, with fifteen separate assignments of the alleged omissions, most of which are matters of evidence. It is also complained that the two instructions are erroneous, because, after stating what the particular count charges, each instruction, in two places, uses the words; "This is denied by the defendant", instead of saying "to the written complaint of plaintiff, defendant has filed his written answer, by which answer, etc." It is argued that the jury could well have thought that the court was assuming to tell the jury that the defendant had denied certain matters of proof on the trial. The objections are without merit. Neither of the criticized instructions directs a verdict. Other given instructions clearly show that negligence of the defendant was charged in the first count, and that willful and wanton conduct was the charge in the second count, and what elements must be proven under each count. Each instruction plainly conveys the idea that the allegations mentioned and denied are issues between the parties, and the suggestion that "This is denied by the defendant" refers to proofs on the trial is too

car, strongly tend to show that in an effort to save Mr. Chapman
close the car door, appellant suddenly and negligently ran out
onto the pavement into the path of appellant's car. It is fundamental
that one cannot recover under a General Negligence count if he is
guilty of contributory negligence. In the opinion on weight of
the testimony does not show that appellant was negligent, or any willful
and wilful misconduct and we are therefore unable to say that the
verdict is against the weight of the evidence under either
count of the count.

Appellant claims that appellant's seventh instruction is
erroneous, the issue under the first of negligence count of the
complaint, and that appellant's fifth instruction is erroneous
the issue under the second of willful and wanton count, with
certain necessary portions thereof, and fifth and seventh counts
counts of the alleged misconduct, count of willful and wanton
evidence. It is also complained that the two instructions are
erroneous, because, after stating that the defendant's count charges,
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by the defendant, instead of saying "to the extent of the
plaintiff, because he failed to exercise proper care, or
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plainly conveys the idea that the allegations mentioned and stated
are issues between the parties, and the suggestion that "This is
denied by the defendant" refers to proofs on the trial is not

strained to merit consideration. As to the omissions complained of, instructions involving a statement of the detailed allegations may confuse a jury, and may give the impression that the court is, in fact, saying what has been proven. (Reivitz v. Chicago Rapid Transit Co., 327 Ill. 207, 212.) In the case at bar there is no possibility that the jury could have been misled by either of the instructions. Two other given instructions told the jury that they should not understand by anything the court had said during the progress of the trial, or by anything contained in the instructions that the court had or had expressed any opinion concerning the facts in the case, and that in reading the instructions to the jury the court did not intend to even intimate what in the judgment of the court their verdict should be. While the instructions are not models of diction, there is no reversible error in either of them.

A more serious question arises in connection with the 14th given instruction, which was as follows: "The court instructs the jury that under the second count of the complaint in order for the plaintiff to prove that the defendant was guilty of willful and wanton misconduct in the operation of his automobile at the time and place in question the plaintiff must prove by the preponderance or greater weight of the evidence either that the defendant intention-
ally ran into the plaintiff or that the defendant intentionally disregarded a known duty necessary to the safety of the person or property of another and then and there exhibited an entire absence of care for the life, person or property of another".

This is not a correct statement of the law. It is well settled that willful and wanton misconduct imports consciousness that an injury may probably result from the act done and a reckless disregard of the consequences. Ill will is not a necessary element to establish the charge. A willful or wanton injury may have been intentional or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of

attained to merit consideration. In the case of the defendant's complaint of instructions involving a statement of the defendant's allegations may continue a jury, and may give the instruction that the defendant is fact, saying what has been proved. (Citation of authority is not necessary.) In the case of the defendant's complaint of instructions, the jury should be instructed that the defendant is not understood by stating the court has not been during the progress of the trial, or by stating the defendant is not understood by the court. The court has not been understood by the jury in the case, and that the defendant is not understood by the court did not intend to even include the defendant in the jury. The court their verdict should be. With the defendant's complaint of dictation, there is no reversible error in either of them. A more serious question arises in connection with the defendant's complaint of dictation, which is a reversible error. The jury that under the second count of the complaint in count 10, the defendant to prove that the defendant was guilty of willful and wanton misconduct in the operation of his automobile at the time and place in question the plaintiff was injured by the defendant's or greater weight of the evidence either way, and the defendant's intentionality ran into the plaintiff's claim for damages. The defendant's disregard of a known duty necessary to the safety of the person or property of another and then and there exhibited an actual absence of care for the life, person or property of another. This is not a correct statement of the law. It is well settled that willful and wanton misconduct imports consciousness that an injury may probably result from the act done and a reckless disregard of the consequences. It will be not a necessary element to establish the charge. A willful or wanton injury may have been intentional or the act may have been committed under circumstances exhibiting a reckless disregard for the safety of

others, such as a failure, after knowledge of the impending danger, to exercise ordinary care to prevent it, or a failure to discover danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care. (Brown v. Illinois Terminal Co., 319 Ill. 326, 331, and cases cited.) Practically the same statement of the law is found in Jeneary v. Chicago & Interurban Traction Co., 306 Ill. 392, 398; Streeter v. Humrichouse, 357 Ill. 234, 238; Covert v. Rockford & Interurban Railway Co., 299 ~~Ill.~~ 288, 291; Heidenreich v. Brenner, 260 ~~Ill.~~ 439, 446; Bernier v. Illinois Central Railroad Co., 296 ~~Ill.~~ 464, 470-471; Bartolucci v. Falleti, 382 ~~Ill.~~ 168, 174. The doctrine is tersely stated in Provenzano v. Illinois Central Railroad Co., 357 Ill. 192, 195, as follows; "In order to constitute willful and wanton misconduct the injury must either have been intentionally inflicted, or produced by acts so grossly negligent as to exhibit a reckless disregard for the safety of others", citing Brown v. Illinois Terminal Co., 319 Ill. 326.

It has often been held that an intentional disregard of a known duty necessary to the safety of the person or property of another, and an entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequence, makes a case of constructive or legal willfulness. (Wallgren Express Co. v. Krug, 291 Ill. 472, 477; Jeneary v. Chicago Interurban Traction Co., supra; Streeter v. Humrichouse, supra; Bartolucci v. Falleti, supra; Bremer v. Lake Erie & Western Railroad Co., 318 ~~Ill.~~ 11, 20-21.) But none of such cases hold that an intentional disregard of a known duty is an element of necessary proof under a charge of willful or wanton misconduct. The instruction complained of erroneously misinformed the jury that such an intention was necessary to be proved. The error was not cured by the correct instruction given for the plaintiff on the same question, for the reason that it is impossible to

others, such as a failure, either knowledge of the independence, or, to exclude ordinary care to prevent it, or, failing to discover danger through examination of the person or thing, or, if discovered by the exercise of ordinary care, it is not discoverable by the exercise of ordinary care. (Harris v. ...)

Terminal Co., 215 Ill. 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

B. Appellee's claim, in his petition for rehearing, that any error in this instruction was waived by appellant's failure to raise any objection to it in his brief or argument, is not well grounded. Although the general rule is that an error assigned but not argued is deemed to be waived, the rule is not applicable here. The 15th point in the statement of grounds relied upon for reversal, after stating that the court erred in giving the instruction, and setting it out, is: "This instruction is misleading and prejudicial and not a correct statement of the law. It is not a question of intentionally injuring the plaintiff or intentionally disregarding a known duty." While the assignment could properly have mentioned only that the court erred in giving the instruction, and the proper place for the reason is in the argument, no more cogent reason why the instruction is erroneous could have been urged, and the reason assigned would have been no more potent by being urged under the division of the brief entitled "Argument." The attention of this court was sufficiently called to the error. (Swain v. Moberg, 380 Ill. 442.) Manifestly, the failure to cite authorities on a point claimed for reversal does not preclude a court of review from considering the question.

Appellee does not claim that the instruction is not erroneous, but argues that the record shows that it was given at appellant's request. He does not claim that it was actually so given, but relies upon the abstract and the record as so showing, and as importing verity. The record does not bear any heading above the instructions, nor group the instructions given at the plaintiff's request separately from those given at the request of the defendant, and plainly discloses that they are intermingled. None of them are numbered. The one in controversy is the 14th in the order of their assembly in the record. Following the last one of the given instructions is a statement that "It appears" that certain of the instructions, designated by the numbers as they appear in the order of their assembly, were offered on behalf of the defendant, and that certain ~~orders~~ others, similarly designated, including the 14th, were offered on behalf of ~~the defendant~~. ~~The statement in appellant's brief is the statement that the~~ given instructions", and in appellant's brief is the statement that the record was written by a court reporter who is now in the service of the United States and failed to place all of the instructions as they should appear, particularly referring to the 14th, listed as given at appellant's request instead of at the request of appellee, and to another of appellee's instructions listed as refused, which was actually given. Of course, as claimed by appellee, we could not consider the statement of appellant in his brief to contradict the record, but appellee is mistaken in his premise that such statement is the only showing that the instruction was given at appellee's request, and not at the request of appellant. It is first to be noticed that the statement in the record at the end of the given instructions is not a statement that the 14th instruction was actually given at appellant's request, but only that "it appears" to have been so given. It is also to be noticed that appellant's motion for a new trial specifically states that the instruction was submitted on behalf of the defendant. Furthermore, the language of the instruction, and its import, clearly show that it would not have been offered by appellant. The instruction immediately preceding the 14th was obviously given at appellee's request, and the one immediately following the 14th was as obviously given at the request of appellant. Considering this and other plainly apparent interminglings of the instructions, tends to account for the manifest error in the statement in the record that "it appears" that the 14th instruction was given at appellant's request. These facts demonstrate beyond doubt that it was not given on behalf of appellant, and the record does not import verity that it was so given, but, on the contrary, shows that it was given at appellee's request, and it is not claimed that it was not given on his behalf.

10a

[illegible]

determine which instruction the jury followed. (Gregory v. Richey, 307 Ill. 219, 233; City of Macon v. Holcomb, 205 id. 643, 646.) The same rule obtains in criminal cases, People v. Allen, 378 Ill. 164, 169.

Because of the error in giving the 14th instruction, the judgment is reversed and the cause is remanded for a new trial.

Reversed and remanded.

*Insert attached
exhibit (B)*

determining which institution and party followed. Gregory v. The City

307 Ill. 232, 833; City of Madison v. Belmont, 309 Ill. 247, 834

The same rule applies in certain cases, People v. Allen, 309

Ill. 184, 185.

Because of the error in giving the name, the

judgment is reversed and the case is remanded for a new trial.

Reversed and remanded.

78 - 42871

ANIE LEVI and BLOCA ALFANDER,

Appellees,

324 1.A. 82

v.

CHARLES H. STERN, MAURICE S. STERN, individually
and as Executors and Trustees, BENOLD S. STERN,
RUBY I. STERN, FAYE A. STERN, INFANT DAUGHTER OF
NURSERY OF CHICAGO, ILLINOIS, HARK, FAYE A. STERN,
HONE, a corp., ORTHODOX JEWISH HOME FOR THE
AGED B.M.Z., a corp., CONGREGATION ANSHAR TORAH ANSHAR
MAARIV, HEBREW SCHOOL OF CONGREGATION ANSHAR HOLER,
TALMUD TORAH, CONGREGATION ANSHAR HOLER, CHEVRA
TILLIM OF THE CONGREGATION ANSHAR HOLER, CHEVRA
GEMORAH OF THE CONGREGATION ANSHAR HOLER, CHEVRA
MAARIV, CHEVRA GEMORAH OF THE CONGREGATION ANSHAR
HOLER, GERALD STERN, LEILA LEVI, L. H. STERN,
JOEL ALEXANDER, ISMAR ALEXANDER, SAMI STERN,
ALEXANDER and H. PLOTNICK,

Defendants.

On Appeal of CHARLES H. STERN and MAURICE S. STERN,
individually and as executors and trustees under
the last will and testament of Father Stern,
deceased, BENOLD S. STERN, RUBY I. STERN and
FAYE A. STERN,

Appellants.

MR. JUSTICE KILY

The main action, No. 42878, and a contempt proceeding
arising therefrom, No. 42871, were consolidated in this appeal. The
opinion in the contempt proceeding follows our opinion in the
main action.

This is an equitable action brought by two daughters of
Father Stern, deceased, against their four brothers and a sister.
Two of the brothers, Charles and Maurice Stern, are charged with
misconduct as trustees and executors under their mother's will,
as a result of which her estate was wasted to the detriment of the
plaintiffs. The decree was for plaintiffs on their amended and
supplemental complaint, as amended, and Charles and Maurice Stern,
hereinafter referred to as Defendants, appeal.

Plaintiffs and Charles, Maurice, Benold, Auby and Faye Stern are children of Esther Stern, who died testate January 31, 1925. In her will in clause 2, she left her cash and gold to the children other than plaintiffs; in clause 5 "her" property real and personal, not otherwise disposed of, to her executors and trustees, from which all children, but plaintiffs, were to be paid money bequests and from which certain small charitable bequests were to be paid; in clause 6 money bequests were made to grandchildren; in clause 8 Mrs. Stern made her seven children residuary devisees and legatees; in clause 10 she gave her executors and trustees discretion to sell or incumber the real estate; and in clause 11 named Defendants executors and trustees.

The inventory listed three pieces of realty; \$35,164.48 in cash and gold; chattels worth \$2,956.30; and accounts receivable of rent due from plaintiff Becca Alexander \$50, and from Defendant's partnership a loan of \$4,645.46. The filing of the inventory either gave rise to, or crystalized animosities between the brothers and sisters, as a result of which the estate has not been closed and but a few small bequests fulfilled. The instant action was begun August 25, 1927, seeking an accounting from, and removal of, Defendants; an injunction restraining them from collecting income from assets of the estate, from using trust funds for personal use and from selling or contracting with reference to the real estate assets. Charles Stern only was served. He demurred and nothing further occurred in the action until July 7, 1937, when the amended and supplemental pleading was filed, seeking substantially the relief prayed for in the original complaint. The cause at issue was referred to a master. Before the master Defendants filed their accounts, receipts and disbursements. The master after extended testimony found Defendants negligent in failing to close

The first of these is the fact that the children in the first class are not only more intelligent than those in the second class, but also more obedient and more industrious. This is due to the fact that the first class is more closely supervised and more carefully instructed than the second class. The second of these is the fact that the children in the first class are more interested in their studies than those in the second class. This is due to the fact that the first class is more interested in their studies than the second class. The third of these is the fact that the children in the first class are more obedient and more industrious than those in the second class. This is due to the fact that the first class is more closely supervised and more carefully instructed than the second class.

extensive training from Government officials in training to close their accounts, receipts and disbursements. The system also found that the system was a success. Before the system was put in place the relief money was in the hands of the officials. The money was

amended and improved. The system was put in place in July 1947, and the

Further progress in the system was made in July 1947, and the

results. Charles Jones only was known. He was known and working

and from which an agreement with reference to the relief money

from each of the relief money was made in the relief money

Defendant; an injunction relief money was made in the relief money

August 10, 1947, resulting in a settlement. The relief money was

and but a few small amounts were made. The relief money was made

and others, as a result of which the relief money was made in close

either have been in, or have been in, the relief money

particulars: Item 1, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 25

the estate by October 2, 1927, two years and a half after letters issued to Defendants, as a result of which the estate suffered. He disallowed some credits and allowed others; and surcharged Defendants' account in excess of \$50,000. The decree modified and supplemented the master's report, principally by finding that Defendants' misconduct and negligence in failing to sell the real property, distribute the assets and close the estate by October 2, 1927, was cause of loss to the estate of \$102,400; that plaintiffs did not contribute to the loss by their conduct; and surcharged that amount with interest to Defendants' account. The master had found that plaintiffs did contribute to the loss by filing this action to prevent a sale. The decree disallowed credits for and surcharged Defendants' account with taxes, repairs, improvements, decorating, rental commissions, janitor services and utilities after October 2, 1927. It further surcharged Defendants' account with the amount of the \$650 rent receivable; \$2,000.00 commissions allowed themselves by Defendants without authority to allow this credit; and \$2,055.67, a set-off made by them on account of taxes paid prior to the death of their mother, and surcharged their accounts with the full amount of the partnership receivable less payments thereon. The penalty of 10% under section 114, Chap. 3, Ill. Rev. Stats. prior to 1939 was applied to these receivables. The decree further surcharged Defendants' accounts with \$13,565 rent for the first apartment and \$18,215 for the second, with interest on both; \$926 for garage rent; \$1,147.65 fees, costs and expenses incurred by Defendant Charles Stern in a Pihos case and charged by him to the estate; \$447 fees of Attorney Harris, who represented Benold, Ruby and Faye Stern in a case construing the will; \$1,620 for stenographers' fees charged to the estate; and \$385.13 for certain insurance items and grave decoration expenses charged to the estate. It ordered

that no attorneys' fees be allowed Defendants in the present action; and that plaintiffs should file their petition for attorneys' fees within 90 days. The surcharges in the decree approximate \$40,000. We need not consider that part of the decree relating to the bequests to charity and the grandchildren. The decretal orders respecting those bequests have been satisfied and the points therefore moot.

The main question revolves about the finding which blamed the Defendants for not selling the real estate, distributing the assets and closing the estate by October 8, 1937. The Defendants say plaintiffs refused to approve probable sales and by persistent litigation prevented sales. A perusal of the assets inventoried and the provisions of the will plainly shows that if the cash assets passed under clause 2, sale of real property was necessary to fulfill bequests and close the estate. Defendants did not sell and taxes, other charges and deflated values followed. The realty inventoried was, at the time of Mrs. Stern's death, valued at \$75,000, and at the time of the hearing in 1938 at \$35,000. In addition to the three pieces inventoried - Western Avenue property, Roosevelt Road property and the Douglas Boulevard property, - Mrs. Stern, prior to her death, owned a fourth piece - Crawford Avenue property - which was subject to a purported deed to Defendants and Harold W., Ruby and Faye Stern several days before their mother's death. This deed and failure to inventory that property caused (if plaintiffs' knew nothing of the deed before inventory) or brought to a head (if they knew of it) the animosities which divided the children. December 1, 1936, plaintiffs sued to set aside the deed, charging their brothers and sister with fraud and undue influence and alleging their mother's mental incapacity. If plaintiffs succeed their residuary interest is enhanced. A master in November 1929 found there was no fraud, but that Mrs. Stern was not competent to convey. A chancellor has not

that no attorney, law firm, or other person is to be permitted to
and that the plaintiff's attorney is to be permitted to
within 30 days. The plaintiff is to be permitted to
he need not furnish any part of the costs of the
demands to satisfy the plaintiff's claim. The plaintiff
requesting these demands have been satisfied by the plaintiff's
Tore was.

The main purpose of the plaintiff's claim is to
the defendant's claim is to be permitted to
within 30 days. The plaintiff is to be permitted to
any of the plaintiff's claims is to be permitted to
litigation or other claims. A demand of the plaintiff
and the plaintiff's claim is to be permitted to
passed under claim, and the plaintiff's claim is to be permitted to
demand and other claims. The plaintiff's claim is to be permitted to
other claims and other claims. The plaintiff's claim is to be permitted to
was, at the time of the plaintiff's claim, the plaintiff's claim is to be permitted to
time of the plaintiff's claim, the plaintiff's claim is to be permitted to
places involved - a claim involving the plaintiff's claim is to be permitted to
and the plaintiff's claim is to be permitted to
owned a certain claim - a claim involving the plaintiff's claim is to be permitted to
to a particular claim - a claim involving the plaintiff's claim is to be permitted to
several days before their mother's death. This claim is to be permitted to
inventory that property passed (if plaintiff's claim is to be permitted to
dead before inventory) or brought to a dead (if they claim it).
the plaintiff's claim which divided the children. December 1, 1980,
plaintiff's claim is to be permitted to
claim with the plaintiff's claim and the plaintiff's claim is to be permitted to
mental incapacity. If plaintiff's claim is to be permitted to
is amended. A matter in November 1980 claim is to be permitted to
that was. It was not convenient to convey. A claim is to be permitted to

yet ruled on those findings. After the filing of the inventory, a dispute arose as to whether a bank account of more than \$30,000 passed under clause 2. Plaintiffs claimed it did not. If they were right, the residuary estate would have been enhanced to their benefit. Defendants took the opposite position and on June 28, 1927, they filed a bill to construe clause 2. Construction was in their favor in the trial court and on November 3, 1930, this court (259 Ill. App. 640) affirmed the judgment, and in February 1931 our Supreme Court denied certiorari. While that case was pending plaintiffs began this action charging misconduct, waste, violation of trust and seeking to restrain the sale of the real estate on the ground that Defendants proposed to sell to a "dummy" at deflated values. October 19, 1934, these plaintiffs again sued seeking to establish a tenancy in common in the three properties inventoried, despite the construction the court placed on clause 2. This action was dismissed in the trial court July 19, 1935 and appealed here by these plaintiffs and the appeal was dismissed in March 1937. July 1937 the final complaint in this action was filed.

There is no doubt that a sale before the beginning of the depression in 1929 would have served all interests best; nor that thereafter and at the time of the trial in 1938, attorneys for all parties agreed a sale of the real estate would be unwise. The question, therefore, narrows to whether Defendants can be blamed for the failure to sell the real estate prior to October 2, 1927, and whether the "wasting" of the estate can be charged to their "misconduct". The trial court held them responsible for not selling by October 2, 1927, and computed the surcharge by taking the mean between the value of the real property at the time of Mrs. Stern's death and \$129,000, its value on October 2, 1927. Defendants were obliged to sell the real estate in order to fulfill the intentions of their mother and, in the will, were given discretionary power to do so. The same question is involved in determining whether they abused their discretion or failed in their duty. The standard of their conduct is that of reasonably prudent

business men performing like duties under a will (In re Estate of Busby, 288 Ill. App. 500), and must be considered in the light of plaintiffs' conduct and its effect on the exercise of Defendants' discretion and performance of their duties. Their conduct must be measured, not under conditions today, but, as existing then. Plaintiffs argue that Defendants made no effort to sell and did not list the property. Defendants say there were offers to purchase, but that plaintiffs refused to approve a sale. We think this issue is not important if plaintiffs' conduct was such as to prevent a sale. While the Crawford Avenue suit in itself had no effect upon the Defendants closing the estate, it does indicate to what extent the animosities in the family had grown by December 1926. It suggests the inference too that any attempt to sell the real estate before October 2, 1927 with the approval, or without the objections, of plaintiffs would have been impossible. The same might be said for plaintiffs partition suit in 1934. While it does not bear directly on the precise question, it sheds some light on the attitude of plaintiffs. Plaintiffs' tenacious position on clause 2 of the will would have caused reasonable men having discretion to sell real estate under a will and reasonably prudent brothers, to hesitate. Finally, we think plaintiffs by this action begun in 1927, seeking to prevent a sale of the real property, are estopped from complaining that they suffered harm because that realty was not sold. This conclusion is not inconsistent with the excellent reasoning of Justice John J. Sullivan of this court in the Busby case and finds support in the case of In re Junkersfeld Estate, 279 N. Y. Sup. 481, cited by plaintiffs. Other cases cited by plaintiffs are distinguishable upon the facts and are not inconsistent with our conclusion. We believe, therefore, that the court committed error by surcharging Defendants' account with \$102,400 with interest at 5% from October 2, 1927; disallowing credit in their account for real and personal property taxes assessed and paid after 1927; and disallowing credits thereafter for improve-

business men performing like duties under a will (in the absence of
Bundy, 222 Ill. App. 500), and must be considered in the light of
plaintiffs' conduct and the effect on the parties to the transaction.
discretion and performance of their duties. The question must be
measured, not under conditions today, but, as existing then, when
this arose that defendants were no effort to sell and did not that
the property. Defendants say there were efforts to dispose of, but
that plaintiffs refused to approve a sale. A third claim is in
not important if plaintiffs' conduct was such as to prevent a sale.
While the Granger Avenue suit in 1931 had no effect upon the
defendants' closing the estate, it does indicate to the court that the
animosity to the family had grown by November 1931. It suggests
the inference too that any attempt to sell the real estate before
October 2, 1937 with the approval, or without the objection, of
plaintiffs would have been impossible. The same might be said for
plaintiffs' partition suit in 1935. While it does not bear directly on
the estate question, it sheds some light on the attitude of plaintiffs.
Plaintiffs' removals of the will would have
caused reasonable men having discretion to sell real estate under a
will and reasonably prudent persons, to hesitate. Finally, we
think plaintiffs by this action began in 1937, seeking to prevent a
sale of the real property, are estopped from complaining that they
suffered harm because that realty was not sold. This conclusion is
not inconsistent with the excellent reasoning of Justice John J.
Mulligan of this court in the Bundy case and finds support in the case
of In re Luskens' Estate, 275 N. Y. Sup. 421, cited by plaintiffs.
Other cases cited by plaintiffs are distinguishable upon the facts
and are not inconsistent with our conclusion. We believe, therefore,
that the court committed error by surcharging defendants' account
with \$103,400 with interest at 5% from October 2, 1937; disallowing
credits in their account for real and personal property taxes assessed
and paid after 1937; and disallowing credits therefor for improve-

ments, repairs, decorating, utility rates, payment of rental commissions, janitor services and all other related credits.

Defendants and Benold H., Ruby and Faye Stern occupied the first apartment of the Douglas Boulevard property and Mrs. Alexander, one of the plaintiffs, and her family, the second apartment. At the time of Mrs. Stern's death a balance of \$650 was due from the Alexanders on account of an accrual of rent. Thereafter Defendants and Becca Alexander, Benold, Ruby and Faye Stern met and agreed upon a rental of \$75 per month for each apartment. The Alexanders paid nothing under the agreement, the others paid for the first few years. Defendants instituted two forcible entry and detainer suits against Mrs. Alexander, neither of which was prosecuted to a conclusion. No claim for rent was joined in either and the inference suggests itself that Defendants may have been motivated by personal feelings. Once the animosities arose, it is clear that attempts to collect the rent were bound to meet with vigorous defenses. After the litigation commenced, negotiations for settlement were carried on for several years, and the question of rentals was involved as a factor. We believe that the rigidity of requirements in conduct of executors and trustees prevent us (Bennett v. Weber, 323 Ill. 283) from permitting Defendants to benefit under the agreement for rent. When the agreement was made and at the time the surcharges were ordered, several beneficiaries, charitable and minor, were awaiting bequests which through a proper management of the property may have been paid. We, therefore, approve the surcharge covering the rent of the first apartment. Mrs. Alexander, however, benefited under the agreement and the surcharge covering the rent due from her family is erroneous. Mrs. Levi, by seeking in this proceeding to prevent Defendants from prosecuting their forcible entry and detainer suit against Mrs. Alexander, is estopped from any benefit arising from the impropriety

...rents, repairs, insurance, utility water, payment of small commissions,
...and other related expenses.
...and ...
...first agreement of the ...
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of the agreement. Furthermore, we believe the court erred in surcharging Defendants' account with the amount receivable for rent which accrued for the second apartment at the time of Mrs. Stern's death, and we believe sufficient cause appears from the record to remove this claim from the 10% provision, Chapter 3, Sec. 114 (Ill. Rev. Stats. prior to 1939).

Prior to the death of his mother, Charles Stern preferred charges of malicious mischief against one Pihos, arising out of damage to the Roosevelt Road property. He acted on behalf of his mother. Absolved of the criminal charge, Pihos sued Charles Stern for damages for malicious prosecution. That case was settled and expenses and attorneys fees incurred. We see no reason why the estate should not bear these obligations and we find error in the surcharge arising out of the case. We believe the master's findings as to litigation expense except as to the Pihos matter and to the finding that the cost of the instant proceeding should be paid from the estate, were proper and that the trial court committed error in modifying those findings.

We approve the disallowance of the unauthorized credit in the form of a set-off of \$2,055.67 for the taxes paid by Defendants' partnership on Mrs. Stern's property before her death and unauthorized commissions of \$2,000, (Nonnast v. Northern Trust Co., 374 Ill. 248); and since no good cause appears why the accounts receivable due from the partnership was not paid October 2, 1927, we approve the surcharge of the 10% penalty thereon under section 114, Chapter 3, (Ill. Rev. Stats. prior to 1939). We approve the surcharges of \$385.13 for insurance premium, grave decorations and other small items and of \$1,620 for stenographic services, none of which were justified by Defendants as proper credits. (Nonnast v. Northern Trust Co.)

There is no basis in the record calling for the appointment of a receiver or attorney for the receiver, and the decree, so far as it purports to appoint the same, is erroneous.

The income from the real estate, most of which was vacant, and the most productive of which was occupied by the parties, was

of the agreement. Furthermore, we believe the court acted in error

charging Defendants' account with the amount receivable for rent which accrued for the second apartment at the time of Mrs. Stern's death, and we believe entitled to remove this claim from the 102 provision, Chapter 5, Sec. 111 (111. Rev. Stat. prior to 1932).

With to the death of his mother, Charles Stern, deceased

charges of malicious mischief against one Stern, arising out of damage to the deceased's real property. He acted on behalf of his mother.

Absolved of the criminal charge, Stern and Charles Stern for damages for malicious prosecution. That case was covered and expense and

attorneys fees incurred. We see no reason why the estate should not

bear these obligations and we find error in the surcharge which was

of the case. We believe the master's findings as to litigation expense

except as to the Pine matter and to the finding that the cost of the

instant proceeding should be paid from the estate, were proper and

that the trial court committed error in modifying those findings.

We approve the disallowance of the unauthorized credit in

the form of a set-off of \$2,000.00 for the taxes paid by Defendants,

partnership on Mrs. Stern's property before her death and unauthorized

commissions of \$2,000. (Hornst v. Northern Trust Co., 274 Ill. 248);

and since no good cause appears why the accounts receivable due from

the partnership was not paid October 1, 1927, we approve the surcharge

of the 102 penalty thereon under section 114, Chapter 5, (111. Rev.

Stat. prior to 1932). We approve the surcharges of \$355.13 for

insurance premium, grave decorations and other small items and of

\$1,620 for stenographic services, none of which were justified by

Defendants as proper credits. (Hornst v. Northern Trust Co.)

There is no basis in the record calling for the appointment

of a receiver or attorney for the receiver, and the decree, so far

as it purports to appoint the same, is erroneous.

The income from the real estate, most of which was vacant,

and the most productive of which was occupied by the parties, was

insufficient to carry the estate. October 31, 1926 Defendants' first account filed and approved in the Probate Court showed a balance of \$32,243.40 after disbursements of \$8,609.12. Defendants have collected the income and managed the estate in the interim, advancing \$24,735.16 of their bequests under clause 2 of the will to preserve the estate. They paid taxes of \$23,691.16 on the properties, carrying the advances as income from year to year and collecting the income each year, and their accounts showed a balance at the time of the hearing of the cause at \$1,452.13. Some objections were made that the executors and trustees had no authority to accept the advances to and on behalf of the estate. We think that plaintiffs are in no position to complain. They must have known that taxes were being paid and the property being preserved in the best manner possible and the advances saved interest.

With reference to the ~~the~~ allowance of attorneys' fees in this action, plaintiffs have enhanced the estate by approximately \$25,000 and are, therefore, entitled to have their attorneys' fees paid from the estate. The sum saved is an important factor to be used in determining the amount of the fees. Defendants' attorneys fees in this proceeding, in view of the surcharges, should not be allowed from the estate. The decree taxed costs, including the master's fees against the Defendants. This was error because the costs should be borne 90% by plaintiffs and 10% by Defendants.

For the reasons given the decree is reversed and the cause is remanded with directions to the Superior Court to enter a decree in conformity with the views expressed herein and with such reasonable orders to Defendants as shall bring about the most prudent and expeditious termination of this estate.

DECREE REVERSED AND CAUSE REMANDED.

* * * * *

In a proceeding for contempt initiated by plaintiffs February 18, 1943, Charles and Maurice Stern were found guilty of

indefinite to carry the same. October 21, 1943, however, first
account filed and approved in the House of Representatives
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REPORT BY THE HOUSE OF REPRESENTATIVES
In a proceeding for contempt initiated by the House
February 18, 1943, Charles and Marion Stern were found guilty of

"wilfully and contumaciously" refusing to file their account within 90 days as provided in the decree of October 21, 1942. They were ordered committed to the County Jail "there to remain * * * unless they shall purge themselves * * * by complying with the provisions of the decree * * *." The bone of contention was the surcharges based on the failure to sell the real estate before October 2, 1927. The respondents took the position that compliance with the decree would nullify its appeal in the main case - No. 42678. Plaintiffs contend that since no supersedeas issued to stay the effect of the decree, respondents are liable for contempt in not complying with the decretal provisions. It is true respondents could have protected themselves by supersedeas, but in view of the amount of the surcharges in the decree, they say they were unable to make the bond, but, of course, they made no application for a bond.

Under the recent decision of the Supreme Court in Cummings-Landau v. Koplin, 386 Ill. 368, it is clear that where a court has jurisdiction to enter an order and that order has been made the subject of a contempt proceeding, the contempt order does not fall because of an error in the order violated. The Supreme Court said in that case that disregard for the dignity of a court cannot be tolerated. The contempt there was for violation of a temporary injunction and the punishment was by fine. There is a difference in the cases. There, the respondents could purge themselves by paying the fine. Here, the respondents can purge themselves only by complying with certain provisions of the decree which we have in the foregoing opinion declared erroneous. The punishment in the Cummings-Landau v. Koplin case did not depend upon the affirmance of the violated order. Here, because of the nature of the contempt order, it does so depend. Under the circumstances we believe we must be realistic and declare that while

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ordered to be referred to the January 1, 1922, and to the

they shall come themselves. It is by the Charter of October 1, 1921

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The respondents took the position that the Charter of October 1, 1921

would nullify the Charter of October 1, 1921, and the Charter of October 1, 1921

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of the nature of the Charter of October 1, 1921, and the Charter of October 1, 1921, and the Charter of October 1, 1921, and the Charter of October 1, 1921, and the Charter of October 1, 1921, and the Charter of October 1, 1921

circumstances we believe we must be realistic and believe that while

respondents were technically in default, it is impossible because of our conclusion in the main case for them to surge themselves of the contempt. We hold, accordingly, that the contempt order must be and it is hereby reversed.

ORDER REVERSED.

BURKE, P.J. AND LUPE, J. CONCUR.

of our system in the case of any emergency, and to the extent of our resources, we will, of course, be prepared to meet any such emergency.

42770

BESS MATHEIS, also known as
BESSIE MATHEIS,

Respondent - Appellee

v.

GEORGE H. AHARONIAN,

Petitioner - Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY,

324 I.A. 82²

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

Defendant was allowed to appeal from an order setting aside a verdict in his favor and awarding plaintiff a new trial.

August 21, 1938, about 6:30 P. M. a car in which plaintiff was riding, driven by her husband, and defendant's car collided in the intersection of Keeney and Kedvale Avenues in Niles Center, now Skokie, Illinois. The verdict was upon plaintiff's action for personal injuries. Her husband's action for property damage was nonsuited. The question is whether the trial court abused its discretion in granting plaintiff a new trial.

At the trial plaintiff, upon objection raised by defendant's attorney, was not permitted to tell what, if anything, she said to her husband immediately before the accident. After the evidence was closed and instructions on contributory negligence were under discussion, the trial court indicated fear that error was committed in sustaining the objection referred to. Thereafter, defendant's attorney withdrew his objection to the question, asked that the case be reopened and plaintiff given an opportunity to answer the question. Plaintiff's counsel objected, and the court thereupon denied defendant's request. Defendant says that "substantially the only legal question is whether the court erred in granting a new trial on the ground that plaintiff was prejudiced by the

These names, also known as
BESSIE MATHER,

Respondent - Appellee

GEORGE W. MATHER,

Petitioner - Appellant.

AP. JUSTICE RICHARD J. ...

Defendant was allowed to ...

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At the trial plaintiff, upon objection raised by

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she said to her husband immediately before the accident. After the

evidence was closed and instructions on contributory negligence

were under discussion, the trial court made the error which

committed in answering the objection referred to. Thereafter,

defendant's attorney withdrew his objection to the question, asked

that the case be reopened and plaintiff given an opportunity to

answer the question. Plaintiff's counsel objected, and the court

thereupon denied defendant's request. Defendant says that "substan-

tially the only legal question is whether the court erred in granting

a new trial on the ground that plaintiff was prejudiced by the

court's erroneous ruling". The record shows that that ruling was not the sole reason for granting the new trial and furthermore, plaintiff may rely upon all the grounds urged in her motion for a new trial. Callos v. Public Taxi Service, Inc., 292 Ill. App. 399.

We shall discuss the conflicts in the evidence to determine whether the court was justified in granting a new trial for reasons related to the weight of the evidence and to the verdict, covered by several grounds in plaintiff's motion; and, in addition, to shed light upon the question of reopening the case. Plaintiff was obliged to prove defendant's negligence, her due care and her injuries proximately resulting from the accident. Testimony for plaintiff on the cause of the accident is, that the Matheis' car entered the intersection first, after she and her husband, looking northeast over the shrubbery four or five feet high at that corner, observed defendant's car about 150 feet north approaching the intersection at about 50 miles an hour; that they were then between 10 or 15 feet east of the east curbline of Kedvale; that their car was stopped at the center line of Kedvale just north of the center line of Keeney, when defendant's car without sounding its horn, "caught" the front part of the Matheis' car and brought both cars together forcibly, causing the damage and injuries. Defendant says he approached the intersection at 20 miles per hour, sounded his horn, saw the Matheis' car when his and it were about 15 feet from the intersection at the northeast corner where the shrubbery was 10 to 14 feet high and interfered with vision; that he entered the intersection first, keeping watch on Matheis's car which, when his car was about 4 feet south of the center line of Keeney, swerved left beyond the center line and its right front struck his left front, bringing the cars forcibly together. These contrary statements

court's erroneous ruling". The record shows that that ruling was not the sole reason for granting the new trial and furthermore, plaintiff may rely upon all the grounds urged in her motion for a new trial. Gallos v. Public Taxi Service, Inc., 202 Ill. App. 3d, 303. We shall discuss the conflicts in the evidence to determine whether the court was justified in granting a new trial for reasons related to the weight of the evidence and to the verdict, covered by several grounds in plaintiff's motion; and, in addition, to shed light upon the question of reopening the case. Plaintiff was obliged to prove defendant's negligence, her own care and her injuries proximately resulting from the accident. Testimony for plaintiff on the cause of the accident is, that the Mathels' car entered the intersection first, after she and her husband, looking northeast over the shrubbery four or five feet high at that corner, observed defendant's car about 150 feet north approaching the intersection at about 50 miles an hour; that they were then between 10 or 15 feet east of the east curbline of Keokuk; that their car was stopped at the center line of Keokuk just north of the center line of Kenney, when defendant's car without sounding its horn, "caught" the front part of the Mathels' car and brought both cars together forcibly, causing the damage and injuries. Defendant says he approached the intersection at 30 miles per hour, sounded his horn, saw the Mathels' car when his and it were about 15 feet from the intersection at the northeast corner where the shrubbery was 10 to 14 feet high and interfered with vision; that he entered the intersection first, keeping watch on Mathels' car which, when his car was about 4 feet south of the center line of Kenney, swerved left beyond the center line and its right front struck his left front, bringing the cars forcibly together. These contrary statements

presented a question for the jury as to defendant's negligence and we cannot say that the finding that he was not negligent was not justified, if the jury gave greater credence to his testimony.

On the question of plaintiff's injuries, she says that following the accident she was placed in a third car by Policeman Weber and others because she was unable to stand or walk and did not go into the Police Station. Weber said when he arrived upon the scene, 4 or 5 minutes after the accident, he found her standing and walking about, and that she continued doing so for several minutes until the cars were towed away; that she sat on a bench in the station and made no complaint at any time of any injuries. She testified that she had never been in any other accident before or since and had never been examined by any doctor other than those who treated her following the accident; that she suffered injuries to her right arm, hand, leg, left ankle and knee, and spine; that she did not walk until 8 or 9 months later and was then carried to and from an automobile for necessary trips; that it was 3 years before she could board a street car or bus or go to the Loop; that at the time of the trial she was still suffering from these injuries. In cross-examination of plaintiff and by defense testimony of statements made by her and documents signed by her, defendant plainly showed that plaintiff had fallen March 1, 1939, injured her left shoulder, ankle and knee; and on April 22, 1940, while a passenger in a street car, had injured her left shoulder, left leg and her neck. In a statement incident to the first of these two accidents, she said that she had "bumped my right arm slightly" in the instant automobile accident; and in a letter written by her November 1939, she complained that substantially the same injuries and pains which she claims were caused by the instant accident, were caused by her fall.

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Furthermore, a physician testified on behalf of defendant that he examined her in November 1939, in connection with her fall; that she had stated that she had not had any other accident; that his examination, including X-rays, disclosed arthritis in both knees, more marked in the left knee, of which she principally complained; that he found no injury to her shoulders or right arm; and that there was no swelling of that arm or right leg. Moreover, Dr. Saunders who she said treated her after the automobile accident in a report of the 1939 accident stated "she had sprained her left knee and ankle" and that she had "probably some arthritis previously." Dr. Saunders did not testify. Plaintiff admitted receiving \$50 from the Street Car Company for any claim she might have had arising out of the 1940 accident. We believe we have pointed out sufficient justification for a finding by the jury that the injuries of which plaintiff complains in this action were not proximately caused thereby and also as justification for giving greater credence to defendant's testimony on the cause of the automobile accident.

Another ground urged for the new trial was the alleged improper conduct of defendant's attorney in continually objecting and thereby confusing and prejudicing the jury. There were many objections made by the attorneys for both sides and the trial court stated the plaintiff should have a new trial and a "new atmosphere". Frequent objections ~~alone~~ do not entitle a party to a new trial. The record shows the majority of defendant's objections were sustained. An attorney is not required to stand by and permit improper questioning and improper testimony simply to provide a calm atmosphere for the trial. We do not see that plaintiff suffered by reason of the objections.

The main point argued here centers about the Court's refusal to permit the plaintiff to testify what, if anything, she said to her husband immediately before the accident. No offer of

Furthermore, a physician testified on behalf of defendant that he examined her in November 1933, in connection with her fall; that she had stated that she had not had any other accident; that the examination, including X-rays, showed no abnormality in both knees; more marked in the left knee, of which she subsequently complained; that he found no injury to her shoulders or wrists; and that there was no swelling of these joints. However, Dr. Campbell who she had consulted had written the following in a report of the 1933 examination: "The right knee is slightly knee and ankle" and that she had "some of the same trouble in the left knee." Dr. Campbell did not testify. Plaintiff requested production from the State of documents for any and all bills and receipts out of the 1930 period. The bill was not produced and plaintiff justification for a finding on the issue that the failure of which plaintiff complains in this action was not immediately caused thereby and also an investigation for which plaintiff referred to defendant's testimony on the issue of the automobile accident. Another ground urged for the new trial was the alleged improper conduct of defendant's attorney in conducting objection and thereby confusing and misleading the jury. There were many objections made by the attorney for both sides and the trial court stated the plaintiff would have a new trial and a "new prosecutor". Frequent objections were made to the evidence and a new trial. The record shows the majority of defendant's objections were sustained. An attorney is not required to stand by and permit improper questioning and improper testimony simply to provide a calm atmosphere for the trial. We do not see that plaintiff suffered by reason of the objections.

The main point argued here concerns about the Court's refusal to permit the plaintiff to testify what, if anything, she said to her husband immediately before the accident. No offer of

proof of any conversation was made. The court improperly sustained defendant's objection but the defendant sought to correct the error in such a way as we believe not only would not prejudice plaintiff, but help her. We believe the plaintiff by objecting to reopening the case waived his right to complain later (Wilkinson v. Service, 249 Ill. 146,) and the court instead of granting a new trial principally for this reason should not have considered this ground. There was no "trickery" involved and, consequently, Herricks v. C. E. & I. R. R. Co., 257 Ill. 264, is not applicable.

Because plaintiff was not permitted to answer the question referred to and "since a passenger need not warn a driver of the approach of another automobile which the driver sees * * *," plaintiff contends that the court committed error in giving three instructions offered by defendant on the question of due care. Her husband testified that he saw defendant's car approaching and there was no necessity of, nor would there have been safety in, warning him. Schultz v. Live Stock National Bank, 278 Ill. App. 623. Under these circumstances plaintiff says it was error to instruct the jury on the requirements of due care. We believe the question of plaintiff's due care was for the jury, under proper instructions, to be determined by all the circumstances of the accident. One of the three instructions referred to, is:

" #4. 'If the plaintiff, Bessie Matheis, while riding in said automobile, by using her faculties with ordinary and reasonable care and looking out for danger, would have avoided the collision and injury on the occasion in question and that she negligently failed to do so and thereby contributed to the injury sustained by her, if you believe she was injured, then she cannot recover in this case.' "

This is a peremptory instruction and contains in different language, in effect, the error in the first instruction condemned in Schultz v. Live Stock National Bank, 278 Ill. App. 623.

proof of any conversation was made. The court incorrectly sustained defendant's objection but the defendant sought to correct the error in such a way as we believe not only would not prejudice plaintiff, but help her. We believe the plaintiff by objecting to reopening the case waived his right to complain later (Wilkinson v. Service).

240 Ill. 142, and the court instead of granting a new trial principally for this reason should not have considered this ground. There was no "triplicity" involved and, consequently, Herricks v.

G. E. & I. E. Co., 247 Ill. 304, is not applicable.

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referred to and "since a passenger need not warn a driver of the approach of another automobile which the driver sees," "Plaintiff contends that the court committed error in giving these instructions offered by defendant on the question of due care. Her husband testified that he saw defendant's car approaching and there was no

necessity of, nor would there have been safety in, warning him.

Schultz v. Live Stock National Bank, 278 Ill. App. 625. Under those circumstances plaintiff says it was error to instruct the jury on the requirements of due care. We believe the question of plaintiff's

due care was for the jury, under proper instructions, to be determined by all the circumstances of the accident. One of the three instructions referred to, is:

"4. If the plaintiff, Bessie Marshall, while riding in said automobile, by using her facilities with ordinary and reasonable care and looking out for danger, would have avoided the collision and injury on the occasion in question and that she negligently failed to do so and thereby contributed to the injury sustained by her, it is believed she was injured, then she cannot recover in this case."

This is a peremptory instruction and contains in different language, in effect, the error in the first instruction condemned in Schultz v.

Live Stock National Bank, 278 Ill. App. 625.

Plaintiff also urged as a ground for a new trial that the court should have permitted evidence of a former judgment in the case of Aharonian, defendant here, v. Bert Matheis, non-suited plaintiff in this action, wherein judgment was for defendant. Since that action was a property damage suit arising out of the instant accident, plaintiff contends that the judgment for defendant there established, by Res Judicata or Estoppel, defendant's negligence here. Neither the parties nor the issues were the same in the prior case and, consequently, neither rule applies. Tomaso v. Sestak, 321 Ill. App. 363.

There is no support in the record for the ground urged in plaintiff's motion for a new trial, that defendant in his testimony confessed error.

We have considered all the grounds urged in plaintiff's motion which we consider necessary to this decision. We are mindful of the rule about incurability of erroneous peremptory instructions but, nevertheless, because of the state of this record on the issue of plaintiff's injuries and their proximate cause, we believe that an injustice would be done defendant by putting him to the expense and inconvenience of another trial. For that reason the order granting a new trial is reversed and the cause is remanded with directions to the Superior Court to proceed in due course.

REVERSED AND REMANDED
WITH DIRECTIONS.

BURKE, P.J. AND LUPE, J. CONCUR.

Plaintiff also urged as a ground for a new trial that the court should have permitted evidence of a former judgment in the case of Abrahamson, defendant here, v. Mary Mahala, non-suited plaintiff in this action, wherein judgment was for defendant, since that action was a property damage suit arising out of the instant accident, plaintiff contends that the judgment for defendant there established, by Res Judicata or estoppel, defendant's negligence here. Neither the parties nor the issues were the same in the prior case and, consequently, neither rule applies. Tomaso v. Bessie, 331 Ill. App. 555.

There is no support in the record for the ground urged in plaintiff's motion for a new trial, that defendant in his testimony confessed error.

We have considered all the grounds urged in plaintiff's motion which we consider necessary to this decision. We are mindful of the rule about immovability of erroneous jury instructions but, nevertheless, because of the state of this record on the issue of plaintiff's injuries and their proximate cause, we believe that an injustice would be done defendant by putting him to the expense and inconvenience of another trial. For that reason the order granting a new trial is reversed and the cause is remanded with directions to the Superior Court to proceed in due course.

REVERED AND REMANDED
WITH DIRECTIONS.

BURKE, P.J. AND LUTZ, J. CONCUR.

42926

KATHERINE MONTGOMERY,
Appellee,

v.

CHECKER TAXI COMPANY, a corpora-
tion, and JOHN MCGREGOR,
Appellants,

CHECKER TAXI COMPANY, a corpora-
tion,
Appellant,

v.

JOHN MCGREGOR,
Appellee,

APPEAL FROM

SUPERIOR COURT,
COOK COUNTY.

I.A. 3

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendants, Checker Taxi Company (hereafter called Checker) and John McGregor, separately appeal from a judgment of \$5,000 in favor of plaintiff, Katherine Montgomery, in an action for personal injuries sustained by her in a collision between the taxi cab of the Checker and the automobile of McGregor at the intersection of Kenilworth avenue and Berkshire street in Oak Park, Illinois, on December 13, 1940 about 4 o'clock in the afternoon. McGregor and his wife joined in an action against the Checker for alleged damages sustained by them, respectively, through the negligence of the Checker. Checker filed a counterclaim against McGregor for damages to its taxi cab. The two actions were consolidated for trial and the court entered judgment on verdicts in favor of the Checker on the McGregor claims and in favor of McGregor on the Checker claim. Checker appeals from the judgment in favor of McGregor. No appeals have been taken on the McGregor claims.

Plaintiff was a passenger in a Checker cab being driven

THE STATE OF ILLINOIS,
County of Cook.

v.

JOHN A. CHECKER, Plaintiff,
vs.
JOHN A. CHECKER, Defendant.

JOHN A. CHECKER, Plaintiff,
vs.
JOHN A. CHECKER, Defendant.

v.

JOHN A. CHECKER, Plaintiff,
vs.
JOHN A. CHECKER, Defendant.

Defendant, John A. Checker, (hereinafter called
Checker) and John A. Checker, (hereinafter called
of 18,000 in favor of Plaintiff, Defendant, in an
action for personal injuries sustained by him in a collision
between the car of the Plaintiff and the car of the
Defendant at the intersection of North Avenue and Madison
Street in Oak Park, Illinois, on December 10, 1910, about
4 o'clock in the afternoon. Plaintiff and his wife joined in
an action against the Checker for alleged damages sustained
by them, respectively, through the negligence of the Checker.
Checker filed a counterclaim against Plaintiff for damages to
his taxi cab. The two actions were consolidated for trial and
the court entered judgment on verdicts in favor of the Checker
on the Checker claim and in favor of Plaintiff on the Checker
claim. Checker appeals from the judgment in favor of Plaintiff.
No appeals have been taken on the Checker claim.
Plaintiff was a passenger in a Checker cab being driven

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north in Kenilworth avenue, a north and south street with lanes for traffic separated by a parkway. McGregor was driving his car west on the north side of Berkshire, and east and west street. The collision occurred in the northeast quarter of the intersection of the two streets after the front wheels of the taxi cab had reached the north curb of Berkshire avenue. The front of the McGregor car struck the right rear of the taxi cab, damaging the fender and wheel and forcing the cab against the brick pillar at the northwest corner of the intersection. Each driver testified that he was driving his automobile about 15 miles per hour at the time of the collision. The cabdriver says McGregor's car was traveling 25 to 30 miles. McGregor says the taxi cab was going 40 miles per hour. Two young girls of school age - one being on the northeast corner of the intersection and the other on the south side of Berkshire, a short distance east of Kenilworth avenue - were the only disinterested witnesses to the accident. One testified that the McGregor car was traveling pretty fast. The other said it was going about 40 miles an hour. Neither saw the taxi cab until just before the collision. Immediately after the accident Mrs. McGregor, who was a passenger in her husband's car and was slightly injured, was taken into the home of Mrs. Elsie M. Tarry, on the northwest corner of the intersection. Mrs. Tarry and her son testified that Mrs. McGregor asked her husband where that car came from, and that he replied, "I didn't see it, honey, I don't know." The McGregors deny this conversation. Plaintiff was thrown from her seat to the floor of the cab and was in a semi-conscious condition when the police arrived 10 or 15 minutes later; she was assisted to her home on Kenilworth avenue, three doors north of the scene of the accident, by the police, and her family physician, Dr. O'Halloran, called; she

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lanes for traffic separated by a parkway. McGregor was driving
his car west on the north side of Kenilworth, and east and west
street. The collision occurred in the northeast corner of
the intersection of the two streets after the front wheels
of the taxi cab had reached the north end of Kenilworth avenue.
The front of the McGregor car struck the right rear of the
taxi cab, damaging the fender and wheel and forcing the cab
against the brick pillar at the northeast corner of the inter-
section. Each driver testified that he was driving his auto-
mobile about 15 miles per hour at the time of the collision. The
captain says McGregor's car was traveling 25 to 30 miles.
McGregor says the taxi cab was going 40 miles per hour. Two
young girls of school age - one being on the northeast corner
of the intersection and the other on the south side of
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it was going about 40 miles an hour. Neither saw the taxi cab
until just before the collision. Immediately after the accident
Mrs. McGregor, who was a passenger in her husband's car and
was slightly injured, was taken into the home of Mrs. Elsie M.
Terry, on the northeast corner of the intersection. Mrs. Terry
and her son testified that Mrs. McGregor asked her husband
where the car came from, and that she replied, "I didn't see
it, honey, I don't know." The McGregors deny this conversation.
Plaintiff was thrown from her seat to the floor of the cab and
was in a semi-conscious condition when the police arrived 10
or 15 minutes later; she was assisted to her home on Kenilworth
avenue, three doors north of the scene of the accident, by the
police, and her family physician, Dr. O'Halloran, called; she

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remained in bed for the next two weeks except for a trip with the doctor the next day to the Garfield Park Hospital where X-rays were made; during the latter part of February 1941 she took an automobile trip to Florida with her daughter, who did all the driving; near the last day of February when enroute home, plaintiff claims to have become sick at Waycross, Georgia, and to have lost consciousness when in Nashville, Tennessee, and remembering nothing until awakening in her home in Oak Park; she left Nashville on the train, coming to Chicago in the care of a nurse, was met at the railway station by Dr. O'Halloran, who testifies he found her in a state of collapse and put her to bed under the care of two special nurses; she remained in bed three weeks and has since been under the care of her physician. She complains of dizziness, headaches, nausea and nervousness..

Dr. Frederick C. Test, who examined her during the trial, testified that she was suffering from a disturbance affecting the nervous centers of the brain and also some irritation of the balance centers in the inner ear; that the X-rays taken at the Garfield Park Hospital and others taken shortly before the trial, in May 1943, show evidence of injury to the fifth vertebra. Dr. Harold N. Wait, the roentgenologist of the Garfield Park Hospital under whose direction the first X-rays were taken, called by the Checker, testified that the X-rays taken by him show ^a/calcareous deposit in the soft tissues of the neck, anterior to the body of the fifth cervical vertebra, and a slight narrowing of the joint space between the bodies of the fifth and sixth cervical vertebrae, and that "That narrow joint space stumps me on what that might be caused by over the time;" that a narrowing of the joint space may be present after an injury. Dr. O'Halloran testified that in his opinion plaintiff will continue to need medical treatment.

remained in bed for the next two weeks except for a trip with the doctor the next day to the Garfield Park Hospital where X-rays were made; during the latter part of January 1941 she took an automobile trip to Florida with her daughter, who did all the driving; near the 1st day of February when encephalitis claimed to have become sick at New York, Georgia, and to have lost consciousness when in Nashville, Tennessee, and resuscitating nothing until arriving in New York in late February; she left Nashville on the train, coming to Chicago in the care of a nurse, was met at the railway station by Dr. O'Halloran, who testified he found her in a state of collapse and put her to bed under the care of two special nurses; she remained in bed three weeks and had since been under the care of her physician. She complains of dizziness, headaches, nausea and nervousness.

Dr. Frederick C. Ford, who examined her during the trial, testified that she was suffering from a disturbance affecting the nervous centers of the brain and also some irritation of the balance centers in the inner ear; that the X-ray taken at the Garfield Park Hospital and others taken shortly before the trial, in May 1940, show evidence of injury to the fifth vertebra. Dr. Arnold H. Reis, the neurologist of the Garfield Park Hospital under whose direction the first X-rays were taken, called by the doctor, testified that the X-rays taken by him show calcareous deposits in the soft tissues of the neck, anterior to the body of the fifth cervical vertebra, and a slight narrowing of the joint space between the bodies of the fifth and sixth cervical vertebrae, and that "That narrow joint space stands as on what might be caused by over the time;" that a narrowing of the joint space may be present after an injury. Dr. O'Halloran testified that in his opinion plaintiff will continue to need medical treatment.

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The evidence as to how the accident happened is in direct conflict. There is evidence tending to show concurrent negligence of the defendants and we cannot say that the verdict of the jury finding them guilty is against the manifest weight of the evidence. There is a conflict in the evidence as to the nature and extent of plaintiff's injuries. If the jury believed the witnesses called by plaintiff the damages awarded are not excessive, and this court is not justified in interfering with the judgment of the jury and the trial court.

The Checker complains of a number of alleged errors in the admission and rejection of evidence and in the giving and refusing of instructions. On cross-examination the plaintiff testified that her husband had paid Dr. O'Halloran a certain sum and that he had also paid the nurses. Counsel for the Checker then moved to strike the evidence pertaining to the doctor bill and the nurses bill because they were paid by the husband. After some talk between the court and counsel the court said, "I will reserve my ruling and you can look into it and call my attention to it then." The record does not show that the court's attention was subsequently drawn to the question by Checker's counsel, and as there was no ruling by the court the objection cannot be upheld. Reaken v. Chicago, B. & Q. R. Co., 156 Ill. App. 65; City of Salem v. Webster, 192 Ill. 369.

Objection is made that Dr. Test should not have been permitted to read the X-rays because he was not a roentgenologist. No objection to his competency was raised at the trial and it cannot be raised on appeal. Furthermore, we think the evidence shows that he was fully qualified. Dr. Test was asked whether or not he had an opinion, based upon his experience, as to whether or not the calcareous deposit in the cervical region which the doctor found in an X-ray film, might or could be

The evidence as to the location of the body is as follows:

There is evidence to show that the body was found in the

vicinity of the entrance to the building on the north side of the street.

of the body lying face down, it is stated that the body was found in the

of the evidence. There is a conflict in the evidence as to

the nature and extent of the injuries. It is stated

believed the witness called by the name of the witness

as not operative, and the court is of the opinion that it is

trying with the judgment of the jury and the court.

The doctor's opinion as to the nature of the injuries is

the admission and rejection of evidence as to the nature and

extent of the injuries. The doctor's opinion is that the

injuries were caused by a blow on the head, and that the

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caused by trauma; counsel for the checker objected, saying, "It has all been gone over, that is not proper;" the objection being overruled, the witness answered, "That is my opinion. It was traumatically caused." Counsel then moved that the answer be stricken, without stating any reason therefor. It is now argued that the answer is objectionable because the doctor stated that the condition was traumatically caused, instead of stating that it might or could have been so caused. If that was the reason prompting the motion at the trial it should have been brought to the attention of the court, which, without the assignment of a new reason, may have thought the motion was based on the reasons assigned for the objection to the question. We do not consider the ruling erroneous. Chicago City Ry. Co. v. Foster, 226 Ill. 288, 290; Walsh v. Chicago Rys. Co., 303 Ill. 339, 344.

Dr. Test examined the plaintiff during the trial at the request of counsel trying the case for her. There is evidence in the record that Dr. Test got some history from the plaintiff, and counsel contend that his testimony shows that he based some opinions, in part at least, upon this history. One question and answer and the ruling of the court on objection thereto and a motion to strike are brought to our attention. By the question the doctor was asked to tell the jury what the tests made by him meant to him - what his conclusion as a medical man was. Objection to the question was overruled and the doctor then answered that his conclusion was that "she was suffering from a disturbance of the brain, disturbances affecting the nerve centers in her brain, and also that she had some irritation of the balance centers in the inner ear." By this question the doctor's answer was limited to conclusions based upon tests made by him, and neither the question nor the answer is subject to the objection now made.

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In answer to a question asking for his objective findings Dr. Test testified that in the turning of plaintiff's head from side to side it was nearly up to what he considered the average normal, but when it came to raising it up and lowering it, it was not more than 50 per cent. A motion was made to strike the answer. During a colloquy between court and counsel which followed, the doctor in answer to a question by the court stated that he regarded his finding as objective because he moved her head by his hands; that in active rotation, turning the head to the left was accompanied by a feeling of rubbing on the right of the neck, indicating the presence of adhesions between the muscles and tendons at that point; that it could be distinctly made out to the touch. Objection is made that the court should have stricken that part of the answer that said the raising and lowering of the head was not more than 50 per cent. The motion as made went to the full answer, and the court's attention was not called to the portion now complained of. The court therefore did not err in its ruling. FitzSimons & Connell Co. v. Braun, 199 Ill. 390, 393; Hall v. Chicago & Alton R. Co., 208 Ill. App. 102; Johnson v. Chicago & Alton R. Co., 202 Ill. App. 369. Other objections to the admission and rejection of testimony are made in which we find no reversible error.

Objection is made to the giving of an instruction which defined the duty of common carriers, on the ground that it omitted all reference to whether the plaintiff was in the exercise of ordinary care for her own safety. The instruction did not direct a verdict and purported to define only the duty of a common carrier. It was therefore not necessary that it contain any statement as to the care required by the plaintiff. Murphy v.

In answer to a question asking for his objective findings Dr. Test testified that in the turning of plaintiff's head from side to side it was nearly up to what he considered comfortable, but when it came to raising it up and to swing it, it was not more than 50 per cent. A motion was made to strike the answer. During a colloquy between court and counsel which followed, the doctor in answer to a question by the court stated that he regarded his findings as objective because he moved her head by his hands; that in active rotation, turning the head to the left was accompanied by a feeling of rubbing on the right at the neck, indicating the presence of adhesions between the muscles and tendons at that point; that it could be distinctly made out to the touch. Objection is made that the court should have noticed that part of the answer that said the raising and lowering of the head was not more than 50 per cent. The motion as made went to the full answer, and the court's attention was not called to the portion now complained of. The court there-fore did not err in its ruling. Wittelsman & Cornell Co. v. Sprague, 130 Ill. 330, 333; Hall v. Chicago & Alton R. Co., 203 Ill. App. 102; Johnson v. Chicago & Alton R. Co., 203 Ill. App. 308. Other objections to the admission and rejection of testimony are made in which we find no reversible error.

Objection is made to the giving of an instruction which defined the duty of common carriers, on the ground that it omitted all reference to whether the plaintiff was in the exercise of ordinary care for her own safety. The instruction did not direct a verdict and purported to define only the duty of a common carrier. It was therefore not necessary that it contain any statement as to the care required by the plaintiff. Barney v.

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Illinois State Trust Co., 375 Ill. 310. Furthermore, upon the evidence in this case it is apparent that the plaintiff exercised all care required of her. No question is raised by the Checker or McGregor and none could be raised as to the due care of the plaintiff.

Plaintiff's instruction as to damages permitted the jury to include in the amount allowed "reasonable medical service, if any, necessarily incurred and to be incurred." In view of what we have said as to the testimony of Dr. O'Halloran and the correctness of the ruling of the trial court in refusing to strike the testimony relating to doctors' and nurses' bills, this instruction is proper.

The court also refused an instruction in the usual form tendered by the Checker stating four propositions which the plaintiff was obliged to prove by a preponderance of the evidence. This instruction was marked by the court "Refused, covered." An examination of the record shows that each of the propositions named were covered except the one requiring the exercise of reasonable care on the part of the plaintiff, and in view of the record in this case on that point, as outlined above, we would not be justified in remanding the case because of the refusal of the instruction.

McGregor, likewise, complains of alleged errors in the receipt of evidence and in the giving and refusing of instructions. The court, over the objection of McGregor's counsel, permitted a police officer to testify, in answer to a question by the Checker counsel, that the cab driver stated he was traveling 15 miles an hour. This statement was made after the police arrived at the scene of the accident, 10 or 15 minutes after its occurrence. It could not be considered part of the res gestae and was not admissible. Peterson v. Cochran & McCluer Co., 308

Illinois State Trust Co., The Ill. St. Trust Co., was the

evidence in this case is contained in the exhibits
exhibited all were produced by the State. In view of
the character of the evidence and the fact that the
case of the plaintiff.

Plaintiff's motion as to discovery was denied the
jury to include in the verdict all the facts necessary
to the case. In view of the fact that the evidence
was not in dispute, the court in its opinion
stated the evidence relating to the facts of the case
this instruction is proper.

The court also refused an instruction in the usual form
tendered by the State. The instruction which the
plaintiff was obliged to move by a preponderance of the evidence.
This instruction was refused by the court. The court
examined the evidence and found that the evidence named
was covered except the one relating to the exercise of reasonable
care on the part of the plaintiff, and in view of the fact that
this case on this point, as stated above, it would not be
justified in remitting the case because of the refusal of the
instruction.

Defendant's motion, claiming of alleged error in the
receipt of evidence and in the giving and returning of instructions.
The court, over the objection of defendant's counsel, permitted
a police officer to testify, in answer to a question by the
State's counsel, that the car driver stated he was traveling at
fifty miles an hour. This statement was made at or the police arrived
at the scene of the accident, 10 or 15 minutes after the
occurrence. It could not be considered part of the evidence
and was not admissible. Peterson v. Goehman & Nelson Co., 308

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Ill. App. 348, 356. Its admission does not warrant reversal of the judgment.

Objection is made that the cross-examination of Mr. Jeske, an investigator for one of the attorneys for McGregor, was made for the purpose of apprising the jury that the defendant McGregor carried insurance. We have examined the record covering this cross-examination and do not believe it supports the interpretation now placed upon it by counsel. Furthermore, the trial court's attention was not brought to this testimony by objection or motion to strike or otherwise.

McGregor objects to certain instructions given on behalf of Checker, two of which relate to the right of way at the intersection and state the rules applied in Heidler Co. v. Wilson & Bennett Co., 243 Ill. App. 89. No specific objection is made to the third instruction, and the objections to the instructions on right of way have no application. We consider the instruction sound.

Objection is also made to the refusal of the court to give instruction No. 17 tendered by defendant McGregor, which told the jury that "the defendant, McGregor, was not required to exercise towards the plaintiff, Katherine Montgomery, the highest degree of care, but the said defendant, McGregor, was only required to exercise toward the plaintiff, Katherine Montgomery, ordinary care" This instruction is marked "Refused. This instruction modified and given." The transcript of proceedings purports to set out the various instructions tendered by the parties and refused or given as tendered by the trial court. It contains no statement relating to instructions modified by the court and given. The certificate recites that the transcript contains "all of the instructions given to the jury and all of the instructions requested by any of the parties

9.

hereto but not given to the jury." McGregor insists that this instruction should have been given because the jury was instructed that the defendant Checker was obliged to exercise the highest degree of care toward its passenger, the plaintiff. These instructions were expressly limited to the Checker, as a common carrier, and had no reference whatever to the defendant McGregor. The instruction as tendered went beyond the real purpose of an instruction, namely, to state the law to the jury, in that it told the jury what degree of care the defendant McGregor was not obliged to exercise. As said in Elgin, J. & E. Ry. Co. v. Lawlor, 229 Ill. 621: "generally, an enumeration of things which the law does not require, and which is in the nature of argument, is at least of doubtful propriety." Its refusal is not error.

The Checker complains of misconduct on the part of plaintiff's attorney, and McGregor complains that the misconduct of the Checker trial attorney prejudiced him before the jury. We do not believe that either of the defendants suffered any real injury from these sources.

The judgment in favor of plaintiff is affirmed. So is the judgment in favor of McGregor on the counterclaim of the Checker.

JUDGMENTS AFFIRMED.

Matchett and O'Connor, JJ., concur.

42996

GENEVIEVE GREEN,
Appellant,
v.
EUGENE L. DREW,
Appellee.

324 I.A. 4
APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment on a verdict finding the defendant not guilty on the trial of a personal injury action after a judgment by default in favor of plaintiff for \$4,000 had been opened up to permit defendant to plead and defend - the judgment and lien to remain in full force until final determination of the case.

Plaintiff's primary contention is that the evidence being close, the instructions should be substantially correct and free from error, and that the court erred in giving too many instructions containing directions to find the defendant not guilty and in giving on behalf of defendant certain instructions which are claimed to be erroneous. She also argues that the verdict is against the manifest weight of the evidence and that the court erred in opening the default judgment and permitting the defendant to plead and defend.

The injuries for which recovery is sought were sustained by plaintiff when she was struck by a north bound automobile driven by defendant at or near the intersection of Ashland avenue and 91st street in the city of Chicago in the early evening of June 16, 1941. The streets were dry and the scene of the accident well lighted. At this point Ashland avenue, a north and south street, is approximately 70 feet in width from curb

3-11-58

APPEAL FROM

CHIEF OF POLICE

CHIEF OF POLICE

APPELLANT

v.

APPELEE

THE CHIEF OF POLICE, CHICAGO, ILLINOIS, vs. THE CHIEF OF POLICE, CHICAGO, ILLINOIS.

1. The appellant appeals from a judgment on a verdict finding

the respondent not guilty on the trial of a personal injury

action after a judgment by default in favor of plaintiff for

\$4,000 had been opened up to permit defendant to plead and

defend - the judgment and lien to remain in full force until

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many instructions containing directions to find the defen-

dant not guilty and in giving on behalf of defendant certain

instructions which are claimed to be erroneous. The also argues

that the verdict is against the manifest weight of the evi-

dence and that the court erred in opening the default judgment

and permitting the defendant to plead and defend.

The injuries for which recovery is sought were sustained

by plaintiff when she was struck by a north bound automobile

driven by defendant at or near the intersection of Ashland Avenue

and 81st Street in the city of Chicago in the early evening

of June 10, 1941. The streets were dry and the scene of the

accident well lighted. At this point Ashland Avenue, a north

and south street, is approximately 70 feet in width from curb

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to curb. Ninety first street is an east and west street approximately 38 feet in width. There are two street car tracks in Ashland avenue, with safety isles for passengers west of the south bound track and east of the north bound track. The easterly safety idle was south of the south crosswalk across Ashland avenue and about 35 feet in length. Evidence most favorable to the plaintiff supports the contention that the plaintiff, a woman about 59 years of age who lived in the neighborhood, attempted to cross Ashland avenue from the east to west on the north crosswalk of 91st street; that before stepping off the curb she looked to the south and saw defendant's automobile near 92nd street, traveling in the north bound street car track; that she did not look again until she was on the north bound car track when she saw the automobile about 15 feet from her and traveling at 25 to 40 or 45 miles an hour; that she started to run straight west to get to the safety island and was struck when in the middle of the south bound street car tracks.

Evidence on behalf of the defendant supports his contention that he was approaching the intersection at about 25 miles an hour; that as he neared the safety island on the south side of the street he noticed plaintiff standing about 6 feet off the curb and maybe 10 feet north of the north crosswalk; that he sounded his horn, plaintiff seemed to hesitate, and he proceeded on; plaintiff then seemed to start across the street, hesitated when about one step east of the car tracks and, when defendant was about 50 feet from plaintiff, she started to run in a northwesterly direction; he applied his brakes and swerved to the left to avoid her but collided with her in the south bound track and north of the

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91st street crosswalk; his car skidded about 25 feet and traveled one or two feet after the collision; he didn't know until just before the accident that plaintiff was going to run.

There were four occurrence witnesses: plaintiff, and a by-stander, now in the armed service, who testified in her behalf, and defendant and a young lady who was riding with him and is now his wife. Attempts were made to impeach plaintiff's witness and the defendant by showing prior contradictory statements of each. Upon this record we cannot say that the finding of the jury was against the manifest weight of the evidence.

Seven of the instructions given on behalf of the defendant authorized or directed a verdict of not guilty. Instruction 21 required plaintiff to prove her case by a preponderance of the evidence. Instructions 23 and 24 were restricted to the charge of wilful and wanton misconduct. Instruction 25 submitted to the jury the question whether plaintiff was negligently crossing the street at a point other than within a crosswalk. Instruction 26 related to the care required of a person confronted with a sudden emergency. Instruction 27 is the usual stock instruction defining four essentials necessary for recovery upon the negligence charged, while instruction 28 stated the rule of contributory negligence. None of the instructions complained of was a duplication of other instructions given. Two related to the charge of wilful and wanton misconduct, four to the negligence count, and the one relating to the preponderance of the evidence was applicable to both charges. The court did not err in giving too many instructions ending with directions to find the defendant not guilty. Peterson v. Cochran & McCluer Co., 308 Ill. App. 348, 364-65.

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That street crossing; his car skidded about 25 feet and
traveled one or two feet after the collision; he didn't
know until just before the accident that plaintiff was
going to run.

There were four occurrence witnesses: plaintiff, and a

by-stander, now in the armed service, who testified in her
behalf, and defendant and a young lady who was riding with him
and is now his wife. Attempts were made to impeach plaintiff's

witness and the defendant by showing prior contradictory
statements of each. Upon this record we cannot say that the
finding of the jury was against the unimpaired weight of the
evidence.

Seven of the instructions given on behalf of the defen-

dant authorized or directed a verdict of not guilty. Instruction
21 required plaintiff to prove her case by a preponderance of
the evidence. Instructions 23 and 24 were restricted to the
charge of willful and wanton misconduct. Instruction 25 sub-
mitted to the jury the question whether plaintiff was negligently
crossed the street at a point other than within a crosswalk.

Instruction 26 related to the care required of a person confronted
with a sudden emergency. Instruction 27 is the usual stock
instruction defining four essentials necessary for recovery
upon the negligence charge, while instruction 28 stated the
rule of contributory negligence. None of the instructions
complained of was a duplication of other instructions given. Two
related to the charge of willful and wanton misconduct, four
to the negligence count, and the one relating to the prepon-
derance of the evidence was applicable to both charges. The
court did not err in giving too many instructions ending with
directions to find the defendant not guilty. Teterson v.

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Instruction 25 quoted that portion of the statute defining a crosswalk and requiring every pedestrian crossing a roadway at any point other than at a marked or unmarked crosswalk at an intersection to yield the right of way to vehicles, and stated that if the jury believed from the evidence that defendant was not guilty of wilful and wanton misconduct and that the plaintiff was crossing 91st street at a point other than within a crosswalk and that in so doing she was guilty of negligence which proximately caused or contributed to cause the collision and her subsequent injury, the plaintiff could not recover and the jury should find the defendant not guilty. This instruction dealt only with plaintiff's alleged contributory negligence and is a correct statement of the law. Minnis v. Friend, 360 Ill. 328, 338. The instruction refers to the crossing of 91st street instead of Ashland avenue, but we do not believe that this error misled the jury. Instruction 26 was a correct statement of the care required of a defendant "confronted by a sudden emergency, with peril imminent, without any fault on his part," and the principal objections is that there is no evidence justifying the giving of the instruction. There is evidence on behalf of the defendant that as he approached the north crosswalk the plaintiff, who was standing east of the street car tracks, walked to the west, hesitated and suddenly ran in front of defendant's car. This was sufficient evidence to warrant giving the instruction. Instructions 23 and 24 related solely to the charge of wilful and wanton misconduct. The jury found in answer to a special interrogatory that defendant was not guilty of this charge. Plaintiff's motion for a new trial is directed against the general verdict and not the special finding. Voigt v. Anglo-American Provision Co., 202 Ill. 462; Avery v. Moore, 133 Ill. 74.

Instruction 33 quoted that portion of the statute defining a crosswalk and requiring every pedestrian crossing a roadway at any point other than at a marked or unmarked crosswalk at an intersection to yield the right of way to vehicles, and stated that if the jury believed from the evidence that defendant was not guilty of willful and wanton misconduct and that the plaintiff was crossing that street at a point other than within a crosswalk and that in so doing she was guilty of negligence which proximately caused or contributed to cause the collision and her subsequent injury, the plaintiff could not recover and the jury should find the defendant not guilty. This instruction deals only with plaintiff's alleged contributory negligence and is a correct statement of the law. Anglo v. Anglo, 350 Ill. 326, 336. The instruction refers to the crossing of that street instead of Ashland Avenue, but we do not believe that this error misled the jury. Instruction 33 was a correct statement of the law required of a defendant "confronted by a sudden emergency, with peril imminent, without any fault on his part," and the principal objections is that there is no evidence justifying the giving of the instruction. There is evidence on behalf of the defendant that as he approached the north crosswalk the plaintiff, who was standing east of the street car tracks, walked to the west, hesitated and suddenly ran in front of defendant's car. This was sufficient evidence to warrant giving the instruction. Instructions 33 and 34 related solely to the charge of willful and wanton misconduct. The jury found in answer to a special interrogatory that defendant was not guilty of this charge. Plaintiff's motion for a new trial is directed against the general verdict and not the special finding. Veit v. Anglo-American Printing Co., 302 Ill. 462; Avery v. Moore, 133 Ill. 74.

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Having acquiesced in this finding she cannot now complain of these instructions. Instruction 21 required the plaintiff to prove her case by a preponderance of the evidence and is in a form frequently given. Chicago Union Traction Co. v. Mee, 218 Ill. 9, 14-17. Objection is made that the instruction was not restricted to matters essential to the maintenance of the action. Other instructions specifically told the jury what plaintiff must prove by a preponderance of the evidence under each count of the complaint, so^{as} that the jury was not misled or left free to exercise its own judgment as to what was material in the case.

Plaintiff contends that the court erred in setting aside the default judgment more than 30 days after its entry. Defendant's motion to vacate this judgment was based upon the charge that he was not properly served with a summons. The record does not show an objection by the plaintiff at the time the order opening up the judgment and permitting the defendant to plead was entered, or an objection at or prior to entering upon the trial of the case or at any time in the trial court. Having proceeded without objection, plaintiff cannot now complain. Freise v. Mid-City Trust & Savings Bank, 298 Ill. App. 17; Zandstra v. Zandstra, 226 Ill. App. 293; Herrington v. McCollum, 73 Ill. 476. Had objection been made the point could be urged here. Ruthfield v. Louisville Fuel Co., 312 Ill. App. 415, 431-2.

There is no merit in plaintiff's objection that the final judgment in favor of defendant was entered without setting aside and vacating the prior judgment by default. The order permitting defendant to plead provided that "judgment and lien to remain in full force until final determination of the case." This is the general rule applicable to the

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Having succeeded in this finding she cannot now complain

of these instructions. Instruction 51 required the plaintiff

to prove her case by a preponderance of the evidence and is in

a form frequently given. Chicago Union Trucking Co. v. Wes-

318 Ill. 9, 14-17. Objection is made that the instruction

was not restricted to matters essential to the maintenance of

the action. Other instructions specifically told the jury what

plaintiff must prove by a preponderance of the evidence under

each count of the complaint, so that the jury was not misled or

left free to examine its own judgment as to what was material

in the case.

Plaintiff contended that the court acted in setting aside

the default judgment more than 30 days after its entry. Defen-

dant's motion to vacate this judgment was based upon the charge

that he was not properly served with a summons. The record

does not show any objection by the plaintiff at the time the

order opening up the judgment and permitting the defendant to

plead was entered, or an objection at or prior to entering

upon the trial of the case or at any time in the trial court.

Having proceeded without objection, plaintiff cannot now complain.

Fisher v. First City Trust & Savings Bank, 328 Ill. App. 17;

Landwehr v. Landwehr, 328 Ill. App. 222; Herrington v. McDougal,

75 Ill. App. 476. Had objection been made the point could be argued

here. Wathfield v. Louisville Fuel Co., 312 Ill. App. 415,

481-2.

There is no merit in plaintiff's objection that the

final judgment in favor of defendant was entered without

setting aside and vacating the prior judgment by default. The

order permitting defendant to plead provided that "judgment

and lien to remain in full force until final determination

of the case." This is the general rule applicable to the

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the opening of a judgment to permit a defendant to plead and defend. 31 Am. Jur., Judgments, §§713, 793. Miles v. Layton, 38 Del. 411. Upon the entry of the judgment for defendant the prior judgment ceased to remain in force.

The judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

IDENTITY

MEMORANDUM FOR THE RECORD

43071)
43072)

324 I.A. 24

GRACE T. DAVIDSON,
Appellee,

v.

R. G. LYDY PARKING CO.,
a corporation,
Appellant.

43071: APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

43072: APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant's appeals from separate judgments entered against it under the power of attorney in a written lease, as modified in writing, for the rent specified therein for different periods of time have been consolidated. The points raised in each case are identical and are purely technical.

The original lease, dated January 1, 1942, for a two year term, provided for a monthly rental of \$475. June 12, 1942 a written agreement signed by plaintiff and defendant was executed reducing the monthly rental commencing as of March 1, 1942 from \$475 to \$356.25, and providing "All the other terms, covenants, conditions of said lease are to remain in full force and effect." The judgments entered were computed upon the reduced rental. On the motion to vacate the judgments by confession and on the appeals defendant contends that because the reduced rental was provided for in a separate written instrument the stipulation in the modifying agreement - apparently entered into in good faith by the defendant - that "All the other terms, covenants, conditions of said lease are to remain in full force and effect," did not preserve the power of attorney to confess judgment for any rent due on the lease. In support of its contention that the necessity of looking to the

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modification agreement to determine the amount due renders the judgment by confession void, the case of Little v. Dyer, 138 Ill. 272 is cited. In this case the lease contained a power of attorney to confess judgment for the rent due, which, under the terms of the lease, was \$300 at stated times, and water rates, gas bills, costs for keeping the premises clean, etc., as additional rent. It was held that one could not give power of attorney to confess judgment for a sum not fixed in the instrument but requiring hearing of evidence outside the obligation. In the present case the pleading of plaintiff set up the modification agreement and the original lease. These instruments must of necessity be considered together, and the fact that they are separate instruments does not change the rights of the parties. Certainly there would be no excuse for raising the point which defendant now urges had the modification been endorsed on the back of the written lease. National Builders Bank v. Simons, 307 Ill. App. 552.

The other ground urged for vacation of the judgment is that a tax receiver was appointed for the premises covered by the lease. There is no allegation that this tax receiver ever undertook to act as receiver or as to the length of time that there was a tax receiver for the premises. Appointment of a receiver does not terminate existing leases. First Nat. Bank of Chicago v. Gordon, 287 Ill. App. 83. There is no merit in this contention.

The respective judgments appealed from are affirmed.

JUDGMENTS AFFIRMED.

Matchett and O'Connor, JJ., concur.

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Submitted: January 1997; accepted: 29 September 1997; first published online: 15 November 1997

7. Agreeing, acting or failing to act in place of another's & account of

SECRET

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Small variations in the amount of water used for irrigation can have a significant impact on the yield and quality of the crop. The amount of water used for irrigation is a critical factor in determining the success of the crop. The amount of water used for irrigation is a critical factor in determining the success of the crop.

9. *Journal of the American Statistical Association*, 1990, 85, 1039-1042.

DECLASSIFICATION AUTHORITY DERIVED FROM:

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 12/16/01 BY 60322 JCS/SP5/STP

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_____ It is requested that the attention

43090

THOMAS J. HURT,
Appellee,
v.
WALTER JURCZCHT,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

32 - I.A. 5²

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of \$7,500 entered against him in an action for personal injuries sustained by the plaintiff by contact with defendant's automobile truck at a point on State street a few feet south of 35th street in Chicago.

State street is a north and south street having two street car tracks. There is a safety island approximately 103 feet long a few feet east of the north bound track and commencing immediately south of the south line of 35th street. Plaintiff had left a moving picture theatre four or five doors south of 35th street on the east side of State street and, intending to cross State street, entered upon the safety island about the middle. Defendant was driving his truck north in the north bound track, or straddling its west rail. Plaintiff testified that he was on the safety island when struck by the truck. A witness called by him testified that as the lights changed against north and south traffic the brakes were applied when the truck was about the center of the safety island and it slid sideways and its right corner was hanging over the safety zone. Defendant testified that he was approaching 35th street with the light in his favor; that he first saw the plaintiff when the latter started stepping off the island; the truck was then about a foot from him and the

THOMAS J. HUNT,
Appellee,
v.
WALTER J. HUNT,
Appellant.

A JURY OF

CHICAGO, ILL.

DOES HEREBY

VERDICT

MR. JAMES J. HUNT, Plaintiff, vs. MR. WALTER J. HUNT, Defendant.

Defendant appeals from a judgment of \$7,500 entered against him in an action for personal injuries sustained by the plaintiff by contact with defendant's automobile truck at a point on State Street a few feet south of 35th Street in Chicago.

State Street is a north and south street having two street car tracks. There is a safety island approximately 100 feet long a few feet east of the north bound track and commencing immediately south of the south line of 35th Street. Plaintiff had left a moving picture theatre four or five doors south of 35th Street on the east side of State Street and, intending to cross State Street, entered upon the safety island about the middle. Defendant was driving his truck north in the north bound track, or straddling its west rail. Plaintiff testified that he was on the safety island when struck by the truck. A witness called by him testified that as the lights opened against north and south traffic the brakes were applied when the truck was about the center of the safety island and its side sidewalk and its right corner was hanging over the safety zone. Defendant testified that he was approaching 35th Street with the light in his favor; that he first saw the plaintiff when the latter started stepping off the island; the truck was then about a foot from him and the

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driver swerved to the left and heard a thud at the rear of the truck.

As the case must be remanded for a new trial, a further statement as to the evidence will not be made. The material question in the case is whether plaintiff was struck while on the safety island or after stepping from it into the street. On this point defendant offered an instruction which the court refused. By this instruction the jury was told, "...if you believe from the evidence in this case, under the instructions of the court that the plaintiff knew of the approach of defendant's motor vehicle, or by the exercise of the degree of care ordinarily to be expected of a person of ordinary intelligence and prudence, under the same or like circumstances would have known of the approach of said motor vehicle, and if you further believe from the evidence in this case that plaintiff negligently ran upon or walked upon said street in the path of said motor vehicle and was thereby injured, and that in so doing, if plaintiff did so, plaintiff failed to exercise the degree of care for plaintiff's own safety above defined, then the plaintiff cannot recover in this case." Defendant insists that the refusal of the instruction was reversible error and cites Thomas v. Chicago Embossing Co., 307 Ill. 134, which we consider controlling. There the court refused an instruction, as follows: "The court instructs the jury that if you believe from the evidence in this case that the plaintiff's foot did not slip or get into the slot and become pinched or crushed, then the plaintiff cannot recover and your verdict should be not guilty." The Supreme court said (141): "This instruction, in our judgment, was vital to the theory of plaintiff in error's case. The defendant in error had suffered a severe injury, - the loss of his right hand, - and the injury had been received while he was operating one of plaintiff in error's

Driver arrived to the left and heard a loud bang as the car

the truck.

As the case must be presented for a new trial, a further

statement as to the evidence is not to be made. The court

question in the case is whether the plaintiff is entitled to

on the safety island on either side of the road to the extent

On this point the court is divided and the plaintiff's motion for

court refused. The court is divided and the plaintiff's motion for

you believe from the evidence in this case, that the plaintiff

tion of the court that the plaintiff is not entitled to a new trial

defendant's motion for a new trial, or by the evidence of the court

are entitled to be awarded a new trial or a new trial on the

gence and evidence, and the court is divided and the plaintiff's

have known of the plaintiff's motion for a new trial, and if you

further believe from the evidence in this case that the plaintiff

reliantly on the evidence in this case that the plaintiff is not

said motor vehicle and the plaintiff is not, and the court is

going, it is entitled to a new trial on the evidence of the

degrees of care for the plaintiff's motion for a new trial, and

the plaintiff is not entitled to a new trial on the evidence of the

that the refusal of the court to award a new trial is an error

after Thomas v. Chicago & North Western Ry. Co., 1911, 191, which

we consider as controlling. There the court refused an instruction,

as follows: "The court instructs the jury that if you believe

from the evidence in this case that the plaintiff is not

not slip or get into the ditch and become injured or killed,

then the plaintiff cannot recover and your verdict should be

not guilty." The Supreme Court said (1911): "This instruction,

in our judgment, was vital to the theory of the plaintiff's

error's case. The defendant in error had suffered a severe

injury, - the loss of his right hand, - and the injury had

been received while he was operating one of plaintiff's cars.

3.

machines which came within the provisions of the statute requiring dangerous machinery to be properly guarded wherever that is possible in its practical operation. The most dangerous part of this particular machine was the part in which defendant in error's hand was crushed. It was shown it was not possible to guard that part of the machine and still operate it. It was defendant in error's theory on the trial, and is here, that his foot slipped into the slot, and that when the plunger descended upon it, pinching his foot, in an effort to extricate his foot he got his right forearm into the press and it was crushed. There can be no question that a party to a cause of action is entitled to instructions which apply directly and specifically to his theory of the facts when there is evidence tending to prove these facts. (Chicago Union Traction Co. v. Leach, 215 Ill. 184; Fessenden v. Doane, 188 id. 228). There was evidence tending to sustain plaintiff in error's theory that defendant in error's foot could not have gotten into the slot and become pinched. This being so, there was ample justification for the giving of such an instruction presenting to the jury directly the theory upon which plaintiff in error was trying the case. In our judgment it was reversible error to refuse to give this instruction or some other instruction properly presenting plaintiff in error's theory of its defense on this point." None of the instructions given by the court covered the question presented by the refused instruction, and it should have been given.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

O'Connor, J., concurs.

Matchett, J., dissents.

I think this instruction requested was covered by others given.

3.

machines which come within the provisions of the statute
requiring automatic recording to be made of all proceedings
that take place in the criminal courts. The fact that
part of this particular machine was the one in use at the
time in error is not material. It was shown that it was
possible to make a copy of the machine and with the
it. It was suggested in error that the fact that the
here, that the fact that it was the one in use at the
dispute, suggested that it, in fact, was the one in use at
extensive the fact that it was the one in use at the
it was suggested that there can be no question that it was
cause of action is entitled to be heard on the merits and
and specifically to the fact that it was the one in use at
evidence tending to prove these facts. People v. [Name], 100
Lend, 111 Ill. 1st; People v. [Name], 111 Ill. 1st; People v. [Name],
evidence tending to sustain a finding of error is not
Defendant in error. It could not be shown that the
and become known, and that it was the one in use at the
tion for the finding of error in the machine in question.
jury directly the fact that it was the one in use at the
the case. In our judgment it was not material that it was
to give this instruction or some other instruction in the case
entirely plain that in error a finding of the fact that it was
some of the instructions given by the court covered the question
presented by the returned bill of particulars, and it would have been
given.
The judgment is reversed and the cause remanded for a new
trial.

REVEREND AND HONORABLE

O'Connor, J., concurring.

Mathews, J., dissenting.

I think this instruction requested was

43036

FRANCES ROTERBA,
Appellee,

v.

ZION BENEVOLENT SOCIETY,
Appellant.

224 I.A. 26
APPEAL FROM

SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for \$500 in favor of plaintiff, entered on the finding of the court in an action based on a burial insurance policy^{issued} on the life of plaintiff's deceased husband for \$500. The deceased applied for the policy September 9, 1941; it issued September 17 thereafter. The insured died June 15, 1942. Proofs of death were submitted, payment refused, and plaintiff began suit January 13, 1943.

The sole defense interposed was that the policy was obtained by false and fraudulent representations made by the deceased with intention to deceive as to the state of his health. He died of coronary thrombosis. The policy provided that "any misrepresentation or false warranty made by me shall defeat and avoid this contract if it shall have been made with actual intent to deceive or if it materially affects either the acceptance of the risk or the hazard assumed by the Association". It also contained a provision that the contract should not take effect until it was actually received by the insured "while he or she is alive and in good health, and this provision shall be and hereby is made a condition precedent to the enforcement of the contract".

The answer averred that the deceased, in reply to question No. 17 of the application, as to whether he had ever had diabetes, cancer, pernicious anemia, apoplexy, tuberculosis,

331A 08

APPEAL FROM
SUPERIOR COURT,
BOON COUNTY.

FRANCIS ROTTER,
Appellee,
v.
ZION BENEFICIAL SOCIETY,
Appellant.

JUSTICE WILLIAM H. HARRIS, JR., CLERK OF THE COURT.

This appeal is from a judgment for \$500 in favor of plaintiff, entered on the finding of the court in an action based on a burial insurance policy^{issued} on the life of plaintiff's deceased husband for \$500. The deceased applied for the policy September 9, 1941; it issued September 17 thereafter. The insured died June 16, 1942. Proof of death was submitted, payment refused, and plaintiff began suit January 18, 1943. The sole defense interposed was that the policy was obtained by false and fraudulent representations made by the deceased with intention to deceive as to the state of his health. He died of coronary thrombosis. The policy provided that "any misrepresentation or false warranty made by an insured and avoid this contract if it shall have been made with actual intent to deceive or if it materially affects either the acceptance of the risk or the hazard assumed by the Association". It also contained a provision that the contract should not take effect until it was actually received by the insured "while he or she is alive and in good health, and this provision shall be and hereby is made a condition precedent to the enforcement of the contract".

The answer averred that the deceased, in reply to question No. 17 of the application, as to whether he had ever had diabetes, cancer, pernicious anemia, apoplexy, tuberculosis,

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arteriosclerosis, thrombosis, myocarditis or nephritis, and in response to question No. 20, by which he was asked, "Have you now, or have you ever had chronic bronchitis or disease of the lungs, heart, liver, stomach, bladder, kidneys, gall bladder or brain?", and in response to question No. 22, "Have you had any illness, disease or injury or consulted any physician?", in each case answered "No". The answer of the company says that these answers were false and untrue "in that the said insured was then and there suffering from muscular rheumatism, myocarditis, hypertension and other ailments which contributed later to the cause of his death"; that defendant had no knowledge of the falsity of these statements and representations; that the same materially affected the risk and hazard "and were made with the intention to deceive this defendant and to induce it to issue said policy"; that defendant would never have issued said policy had it known the insured's true condition of health.

Plaintiff, by replication, took issue on these allegations.

Defendant is a non-medical insurance company. It does not require medical examinations of applicants, relying solely upon statements made by them in their application. When the cause came on for trial defendant assumed the burden of proving the insured had made false representations in regard to his health, as alleged in the answer. Plaintiff was called as a witness. It appeared she spoke the Polish language and could not read English. She said her husband's doctor was Dr. Pierzynski; that Dr. Pierzynski filled out the proof of loss and filed it. She also identified her husband's signature to the application and offered in evidence the proofs submitted by her. In response to other questions she said Dr. Pierzynski had treated her husband in 1939 and sometimes after that for "colds".

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you now, or have you ever had chronic prostatitis or disease
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falsity of these statements and representations; that the same
materially affected the risk and hazard "and were made with the
intention to deceive this defendant and to induce it to issue
said policy"; that defendant would never have issued said policy
had it known the insured's true condition of health.
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tions.
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Pierzynski filled out the proof of loss and filed it. She also
identified her husband's signature to the application and offered
in evidence the proofs submitted by her. In response to other
questions she said Dr. Pierzynski had treated her husband in 1930
and sometimes after that for "colds".

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In the physician's statement attached to the proofs of claim Dr. Pierzynski said that he first treated the deceased April 2, 1942; for coronary thrombosis; that he had not treated him for any other complaint or diseases; that he was the regular attendant or consultant of the deceased; that he had attended him on December 20, 1939, for myalgia or muscular rheumatism of the calf of the leg; that deceased had not undergone any surgical operation; that the immediate cause of death was thrombosis; that the duration of the attack was about six hours; that it was the second attack; that the contributing cause of death was chronic myocarditis and hypertension and the duration of the contributing cause was about six months; that the date of the last prescription was June 15, 1942.

Defendant called Dr. Finberg, who qualified as a physician and surgeon experienced in heart diseases. In response to a hypothetical question he said that cases such as that of the deceased "usually take a cycle of five years average, some a little less and some a little more"; that rheumatism is the principal cause of heart disease; that perhaps ninety-five per cent of heart conditions are caused by it; that coronary thrombosis is thrombus that forms in a coronary vessel, a sort of vegetative growth that usually follows an endocarditis, preceded by a rheumatic condition which may have come any time during a lifetime, at times during childhood or during adult life, depending upon the seriousness it develops; that the growth becomes so large that it obstructs the vessel within which it is formed and that causes death. He said that chronic myocarditis is a condition of long standing in which the muscles of the heart are enlarged; that hypertension refers to blood pressure that has been elevated above normal; that there are many things that produce hypertension and many things we do not know; that hypertension is not understood exactly, and it is

In the physician's statement attached to the cross of claim Dr. Pierzynski said that he first treated the deceased April 8, 1942; for coronary thrombosis; that he had not treated him for any other complaint or disease; that he was the regular attendant or consultant of the deceased; that he had attended him on December 20, 1938, for myalgia or muscular rheumatism of the calf of the leg; that deceased had not undergone any surgical operation; that the immediate cause of death was thrombosis; that the duration of the attack was about six hours; that it was the second attack; that the contributing cause of death was chronic myocarditis and hypertension and the duration of the contributing cause was about six months; that the date of the last prescription was June 15, 1942.

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also associated with heart disease and "it may be associated with infection". He also said that myalgia was another name for a rheumatic condition. These heart conditions were not likely to be produced by trauma or injury. He said he did not know the insured; that he had examined the death certificate and it showed the immediate cause of death was coronary thrombosis of two months' duration. This, he said, was likely wrong, because it showed a two months' coronary thrombosis and myocarditis for six months and that did not jibe. He did not think the doctor lied about it but he may have been misinformed. He thought he erred in his judgment. He was of the opinion that a man affected with such a condition would know about it, as he would suffer pain, although he said it was possible for a man to have coronary thrombosis and not know it before his first attack. He did not think it was possible for a man to have myocarditis for a period of six months and not know it. In myocarditis an enlarged heart is definitely produced. He thought it was impossible for a person to have coronary thrombosis for four months, chronic myocarditis for eight months and hypertension for eight or nine months without knowing it, because the conditions preceding are of several years standing before they reach that stage. In his opinion any one of these causes is preceded by rheumatic carditis or rheumatic myocarditis. He thought Dr. Pierzynski erred in his judgment in making out the death certificate. Dr. Pierzynski was not produced as a witness.

The defendant rested its case. Plaintiff moved for judgment on the ground there was no proof in the record to sustain the allegation in the answer of the defendant that the insured had actually made any false statements in regard to the condition of his health or that he had knowledge of any such conditions. The motion was granted. The trial judge said that the

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also associated with heart disease and "it may be associated with infection". He also said that myalgia was another name for a rheumatic condition. These heart conditions were not likely to be produced by trauma or injury. He said he did not know the insured; that he had examined the death certificate and it showed the immediate cause of death was coronary thrombosis of two months' duration. This, he said, was likely wrong, because it showed a two months' coronary thrombosis and myocarditis for six months and that did not like. He did not think the doctor lied about it but he may have been misinformed. He thought he erred in his judgment. He was of the opinion that a man affected with such a condition would know about it, as he would suffer pain, although he said it was possible for a man to have coronary thrombosis and not know it before his first attack. He did not think it was possible for a man to have myocarditis for a period of six months and not know it. In myocarditis an enlarged heart is definitely produced. He thought it was impossible for a person to have coronary thrombosis for four months, chronic myocarditis for eight months and hypertension for eight or nine months without knowing it, because the conditions preceding any of several years standing before they reach that stage. In his opinion any one of these causes is preceded by rheumatic arthritis or rheumatic myocarditis. He thought Dr. Piatyanski erred in his judgment in making out the death certificate. Dr. Piatyanski was not produced as a witness.

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evidence was not sufficient to overcome the presumption of the applicant's good health at the time he received the policy. The court said: "I cannot guess about these things. The presumption of law is that every man is healthy."

The defendant contends that the burden of proof was shifted to the plaintiff by the statements which appear in the proof of claim. These were admissible for the purpose of showing compliance with the terms of the policy by the insured but not as evidence against the insurer as to facts therein stated. Ferrero v. National Council, 309 Ill. 476. A like rule obtains as to statements made by a physician which are filed with the proofs of claim. Vail v. North American Insurance Co., 191 Ill. App. 297. The facts made to appear by the statement of the attending physician we think all tended to show that (plaintiff) was in good health at the time the policy issued. In the absence of proof otherwise that is the presumption of law. Middleton v. North American Protective Association, 260 Ill. App. 288. The court did not err in so holding.

The judgment will be affirmed.

AFFIRMED.

Niemeyer, P. J., and O'Connor, J., concur.

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evidence was not sufficient to overcome the presumption of the
 applicant's good faith at the time he received the money.
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The defendant contended that the burden of proof was
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 proof of claim. These were inadmissible for the purpose of making
 compliance with the terms of the policy of the insured and not
 as evidence against the insurer as to how the claim was
 made. Ex parte, National Council, 200 Ill. App. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.
 The judgment will be affirmed.

REVEREND

Witness my hand and seal of office, this 1st day of January, 1900.

[Handwritten signature]

43080

FLORENCE ZAK,
Appellant,

v.

JAMES C. BAKER,
Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

324 I.A. 6²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages for personal injuries claimed to have been sustained by her as a result of defendant's negligence. There was a jury trial, a verdict and judgment in defendant's favor and plaintiff appeals.

The record discloses that a short time after midnight of January 4, 1944, plaintiff was riding in the back seat of an automobile which was being driven by Clark R. Davey on U. S. Highway 66 at or near its connection with Prescott avenue, Chicago. They had been to LaGrange and were returning to their homes. Eileen Gubbins, who was a member of the party, was riding in the front seat. Defendant, James C. Baker, who lived in Hinsdale, had been in Chicago that evening and was returning home driving his automobile when there was a collision at or near the junction of the two roadways, as a result of which plaintiff was injured. The weather was cold and the streets icy and very slippery. Route 66 is a four-lane highway and is more or less winding. It extends generally northeast and southwest and Prescott avenue is a north and south street.

The theory of plaintiff was that she was in the exercise of due care for her own safety and that she was injured as a result of the negligence of Baker, while on the other hand,

Plaintiff, Defendant,
v.
JAMES O. BAKER,
Defendant.

Plaintiff, Defendant,
v.
JAMES O. BAKER,
Defendant.

MR. JUSTICE: This case is brought before me by the plaintiff, James O. Baker, who is a resident of Chicago, Illinois, and the defendant, Plaintiff, who is a resident of Chicago, Illinois.

The plaintiff brought this action against the defendant for recovery damages for personal injuries sustained by her as a result of defendant's negligent driving. It was a jury trial, a verdict and judgment in favor of the plaintiff and plaintiff appeals.

The record discloses that at about five o'clock on the night of January 4, 1934, Plaintiff was riding in the back seat of an automobile which was being driven by James O. Baker on U. S. Highway 66 at or near the intersection of the highway and Avenue, Chicago. They had been to a party at the home of their mother, Ellen Baker, who was a resident of the city, was riding in the front seat, Defendant, James O. Baker, who lived in Hinsdale, had been in Chicago that evening and was returning home driving his automobile when there was a collision at or near the junction of the two highways, a result of which Plaintiff was injured. The weather was cold and the streets icy and very slippery. Route 66 is a four-lane highway and is more or less winding. It extends generally northwest and southwest and Prospect Avenue is a north and south street. The theory of Plaintiff was that she was in the exercise of due care for her own safety and that she was injured as a result of the negligence of Baker, while on the other hand,

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defendant Baker's position is that he was guilty of no negligence but that the collision resulted from the negligence of Davey in driving his car which skidded in front of Baker's automobile, there was a collision and plaintiff was injured. All the evidence is to the effect that plaintiff was in the exercise of due care for her own safety and there is no argument to the contrary, but the controversy is as to whether one or both of the drivers of the two automobiles were guilty of negligence as a result of which plaintiff was injured.

Since we have reached the conclusion that the case must be tried again, we do not in detail discuss the evidence.

Defendant called Joseph Blazek who at the time of the accident was a police officer and was 250 to 300 feet from the point of the collision. He arrived very shortly after the accident occurred, and testified in substance that he did not see the collision. He then testified as to what he saw with reference to the automobiles and to the persons who were in them and what they told him. That as a police officer he had made a written report shortly after the accident which was presented to him by counsel for defendant and which he identified as being in his handwriting; that he got the information from the parties involved in the collision. Counsel for defendant then offered the report but on objection it was excluded.

Counsel for plaintiff objected to the argument made by counsel for defendant but the objections were overruled. The argument was that plaintiff had not called Davey as an important witness, he being the driver of the car in which plaintiff was riding at the time of the collision, and that counsel for plaintiff knew that if he were present and testified, he would be confronted with the police officer. Counsel also commented

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but that the collision resulted from the negligence of the
in driving his car which collided in front of the automobile,
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contrary, but the controversy is as to whether one or both of
the drivers of the two automobiles were guilty of negligence
as a result of which plaintiff was injured.
Since we have reached the conclusion that the case was
to be tried again, we do not in detail discuss the evidence.
Defendant called Joseph H. Baker who at the time of the
accident was a police officer and was 150 to 200 feet from the
point of the collision. He arrived very shortly after the
accident occurred, and testified in substance that he did not
see the collision. He then testified as to what he saw after
reference to the automobiles and to the persons who were in
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as being in his handwriting; that he got the information from
the parties involved in the collision. Counsel for defendant
then offered the report but on objection it was excluded.
Counsel for plaintiff objected to the report made by
counsel for defendant but the objection was overruled. The
argument was that plaintiff had not called Baker as an impor-
tant witness, he being the driver of the car in which plaintiff
was riding at the time of the collision, and that counsel for
plaintiff knew that if he were present and testified, he would
be confronted with the police officer. Counsel also commented

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on the fact that he had offered the police officer's report but that it was objected to and the objection sustained. The court sustained objection to this argument and told the jury to disregard it but counsel immediately continued: "I don't want you to consider it, but I do want you to consider the absence of it. Now you know you can go on this basis and say, well, I have got five or six witnesses out there in the hall, but I am not going to bring those in. If you have witnesses out there and they are available and ready to testify, you have to have some explanation of why they are not here. And you, as everyday workaday people, have a right to say, why isn't it here? Why isn't the police report in evidence?" This argument was highly improper and without justification or excuse as the court said in Chicago City Ry. Co. v. Gregory, 221 Ill. 591.

The issues in this case were simple and easily understood by the jury. We think there is no need to comment on the instructions to the jury. The court should have no trouble in properly instructing the jury in this case.

For the reasons stated, the judgment of the Circuit court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

Niemeyer, P. J., and Matchett, J., concur.

on the fact that he had offered the police officer's report but that it was objected to and the objection sustained. The court sustained objection to this argument and told the jury to disregard it but counsel immediately responded: "I don't want you to consider it, but I do want you to consider the absence of it. Now you know you can go on with this and say, well, I have got five or six witnesses out there in the jail, but I am not going to bring those in. I have witnesses out there and they are available and ready to testify, you have to have some explanation of why they are not here, and you see everyday working people, have a right to go, why don't they here? Why isn't the police report in evidence?" This argument was highly improper and without justification or excuse as the court said in Chicago City Ry. Co. v. Murphy, 181 Ill. 511. The issues in this case were simple and clearly well stated by the jury. I think there is no need to comment on the instructions to the jury. The court should have no trouble in properly instructing the jury in this case. For the reasons stated, the judgment of the circuit court of Cook County is reversed and the case remanded.

REVEREND AND HONORABLE

HENRY, J., and MONTGOMERY, J., concur.

43086

WILLIAM GEORGE HETTICH and JEAN
von der LIPPEN, a Minor by Elsie
HETTICH von der LIPPEN, Her Next
Friend, et al.,

Appellants,

v.

ROSELLA HETTICH ALBERT, et al.,
Appellees.

106 A
APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

324 I.A. 87

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiffs and certain counterclaimants seek to reverse a decree entered by the Circuit court of Cook county sustaining the master's report and dismissing the complaint and counterclaim for want of equity.

November 12, 1941, a complaint in equity was filed in which it was alleged that all of the outstanding shares of the common stock of the Standard X-Ray Company, an Illinois corporation, were, on November 13, 1930, given by William G. Hettich, since deceased, who then owned the stock, to defendant, Rosella Hettich Albert, his only child and that she held the stock as trustee under an oral trust for herself, plaintiffs and counterclaimants. The prayer was that a decree be entered in accordance with the allegations of the complaint; that Mrs. Albert be removed as trustee; a successor trustee appointed; for an accounting, etc.

The record discloses that William George Hettich, Sr., for a number of years, had been engaged in the X-Ray business, was president and director of the Standard X-Ray Company and prior to and on November 12, 1930, owned nearly all of the common stock and a number of shares of the preferred stock of that company. He was taken ill and was a patient at the Grant

WILLIAM GEORGE HESTICH and LEAH
von der LIEBEN, a minor by Elsie
HESTICH von der LIEBEN, Her Next
Friend, et al.,

Appellants,

v.

ROSELIA HESTICH ALBERT, et al.,
Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

3241A.37

MR. JUSTICE CONYER DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiffs and certain counterclaimants seek to reverse a decree entered by the Circuit Court of Cook County sustaining the master's report and dismissing the complaint and counterclaim for want of equity.

November 12, 1931, a complaint in equity was filed in

which it was alleged that all of the outstanding shares of the common stock of the Standard X-Ray Company, an Illinois corporation, were, on November 12, 1930, given by William G. Hestich, since deceased, who then owned the stock, to defendant Roselia Hestich Albert, his only child and that she held the stock as trustee under an oral trust for herself, plaintiffs and counterclaimants. The prayer was that a decree be entered in accordance with the allegations of the complaint; that Mrs. Albert be removed as trustee; a successor trustee appointed; for an accounting, etc.

The record discloses that William George Hestich, Sr., for a number of years, had been engaged in the X-Ray business, was president and director of the Standard X-Ray Company and prior to and on November 12, 1930, owned nearly all of the common stock and a number of shares of the preferred stock of that company. He was taken ill and was a patient at the Grant

2.

Hospital, in Chicago, at intervals during the summer and fall of 1930. He was suffering from an incurable cancer and died February 27, 1931, at Los Angeles, Calif., where he had gone a few days before. November 12, 1930, while he was at the Grant Hospital, he summoned Edgar J. Cook, an attorney at law, to the hospital to draw his will. Cook went to the hospital on that day and was advised by Mr. Hettich that he wanted to leave all of his property to his daughter, Rosella Hettich Albert. His wife had died some time before and Rosella was his only child. At that time Hettich owned stock in a few other corporations, his home in Wilmette and probably some other property. The evidence is further to the effect that Cook advised Hettich that since all of the property was to be given to the daughter by the proposed will, the costs and other expenses of administering the estate might be saved if the home was conveyed and the stock certificates assigned and delivered to the daughter, Rosella. Hettich agreed to these suggestions and Cook then further suggested that the stock certificates be obtained by Rosella who was present and have them at the hospital the next day when they might be assigned to her by her father when he executed the will which Cook was to prepare. Cook then went to his office, prepared the will, by the terms of which all the property was devised and bequeathed to Rosella; drew a deed for the home, and went to the hospital on November 13, 1930. Cook submitted the will to Mr. Hettich who executed it and it was witnessed by three witnesses, one of which was Cook. At the same time, the certificates of stock were produced, they were assigned by Mr. Hettich to his daughter and the deed and the certificates were delivered to her at that time. The will has never been probated but on the 5th day of November 1941, was filed with the clerk of the Probate court of Cook county. In her answer Rosella, among other things, denied there

Hospital, in Chicago, at intervals during the summer and fall of 1930. He was suffering from an inoperable cancer and died February 27, 1931, at Los Angeles, Calif., where he had come a few days before. November 12, 1930, while he was at the Grant Hospital, he executed a will, in which he named his wife, Cook, as his sole beneficiary. Cook went to the hospital on that day and was advised by Mr. Hettich that he wanted to leave all of his property to his daughter, Rosella Hettich. His wife had died some time before and Rosella was the only child. At that time Rosella owned stock in a Los Angeles corporation. It was, his home in Illinois and probably some other property. The evidence is further to the effect that Cook and Rosella Hettich had since all of the property was to be given to the daughter by the proposed will, the stock and other assets of Rosella Hettich. The estate might be saved if the home was conveyed and the stock certificates assigned and delivered to the daughter, Rosella. Hettich agreed to these suggestions and Cook then further suggested that the stock certificates be obtained by Rosella who was present and gave them to the hospital the next day when they might be assigned to her by her father. When he executed the will which Cook and he prepared, Cook then went to his office, prepared the will, by the terms of which all the property was devised and bequeathed to Rosella; drew a deed for the home, and went to the hospital on November 12, 1930. Cook submitted the will to Mr. Hettich who executed it and it was witnessed by three witnesses, one of which was Cook. At the same time, the certificates of stock were produced, they were assigned by Mr. Hettich to his daughter and the deed and the certificates were delivered to her at that time. The will has never been produced between the 12th day of November 1931, was filed with the clerk of the Probate Court of Cook County. In her answer Rosella, among other things, denied there

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was an oral trust. After the cause was at issue it was referred to the master to take the proofs and make up his report.

The record is voluminous, 1374 pages. The master in his report certifies that the transcript before him consisted of 1215 pages, 363 exhibits for plaintiffs and 104 for defendants. Most of these exhibits are the books and records of the Standard X-Ray Company. The master finds that in October, 1930, the sole relatives of Hettich "and who concerned him regarding the making of them beneficiaries of his bounty were" Rosella Hettich Albert, his daughter, Herminia Hettich, his mother, August H. Hettich, his brother, Alberta Franklin and Elsie von der Lippen, his sisters.

The evidence further shows that in October, 1930, Hettich owned or held under contract of purchase, 577 shares of the common stock and 148 shares of the preferred stock of the Standard X-Ray Company. He also owned 100 shares of stock in The Fair, 25 shares of Stewart-Warner, 240 shares of the Edgewater Trust & Savings Bank, some other stocks, and his home in Wilmette. At that time, just before he was to go to the hospital he gave to his mother 27 shares, 30 shares to each of his two sisters and 61 shares to his brother, August, of the preferred stock of the Standard X-Ray Company. The defendant, Rosella, the daughter, and defendant, Arthur F. Albert, were married in 1926. Shortly after the marriage Albert became associated with the X-Ray Company which, during the depression a few years thereafter, (of which we take judicial notice, Straus v. Chicago Title & Trust Co., 273 Ill. App. 63; Atchison T. & St. Fe Ry. Co. v. United States, 284 U. S. 248) was not in a good financial condition and Albert loaned and advanced moneys to his father-in-law personally and to him to be used for the Standard X-Ray Company. These advances aggregating \$16,700

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were made during a period covering a few years. There is further evidence to the effect that after Hettich's death in February, 1931, Albert paid debts which Hettich owed amounting to \$13,764.54 and that these moneys, according to defendants' evidence, were more than the value of all the stocks turned over to Rosella by her father in November, 1930. On the other hand, plaintiffs and counterclaimants contend that the evidence shows that the stock of the Standard X-Ray Company given to Rosella in November, 1930, was worth approximately \$200,000. For many years August, a brother of the deceased, had been connected with the X-Ray Company, was a director and officer and employed by it, and after the death of Mr. Hettich in February, 1931, the business was continued and the defendant, Albert, was elected director and president and continued in that capacity up to the time of the entry of the decree. A few years before the suit was filed in November, 1941, difficulties arose between the Hettichs on one side, and the Albers on the other, the Hettichs taking the position that the stock of the X-Ray Company was given to Rosella Albert, the daughter, by her father in trust. That she held it in trust -- one-half for the Hettichs and the other half for herself. On the other hand, the contention of the Albers was and is that the stock was given outright to Rosella and that the Hettichs had no interest in it.

Each side offered evidence both oral and documentary tending to sustain their respective positions. The evidence was sharply conflicting on this controlling question. Among other things, plaintiffs and counterclaimants offered in evidence what purports to be a copy of Mr. Hettich's will dated: "The -- of November, A. D. 1925." It was not signed by Mr. Hettich nor by any witness. The purport of this document which is drawn in the language of a will is that after the payment of debts and funeral expenses the stock of the Standard X-Ray Company

5.

involved in the instant case, was given and bequeathed to the Continental and Commercial Trust and Savings Bank, in trust. The bank was given broad powers to handle the stock substantially as the owner might do and after payment of all costs to divide the income one-half to the daughter, Rosella and the other half - in equal parts to his brother, each of his two sisters and his mother. Upon the death of the last survivor of the cestui qui trustent, the trust should cease and the trustee was to transfer and deliver the property then in the trustees hands to the surviving issue of the beneficiaries. The rest of the property, the document provided, was devised to his daughter. The bank was appointed executor.

Attorney Cook, called by plaintiffs, who was at Grant Hospital on November 12, 1930, getting information so that he could prepare the will the next day as above mentioned, testified that Mr. Hettich said he wanted to leave everything to his daughter and that he would follow Mr. Cook's advice so as to avoid costs of administration. The father said to his daughter, Rosella, who had just been called into the room that Mr. Cook said that: "it might be advisable to save administration expenses and costs to make an assignment of my property, stocks, etc., to you after the will is drawn. Now, Dolly, [Rosella] with that understanding, my talks, agreements and understanding with you, will you do as you have promised and agreed to do with respect to the members of my family? Dolly said, 'Yes, Daddy,' I said, 'All right, Bill, and Dolly you better have all the stocks here tomorrow. I will return to my office and draft the will.'" That he did so and returned the next day. Cook further testified that on November 12 he asked Hettich what the stocks in the several companies which Hettich owned were worth and that Hettich replied "Over \$200,000." This conversation as testified to by Cook, was denied by Rosella. She testified there was never any such con-

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involved in the instant case, was given and recommended to
the Continental and General Trust and Savings Bank, in
trust, the bank was given power to receive and hold
separately in the name of the trust all other property of all
sorts to divide the income one-half to the daughter, Rosella,
and the other half - in equal parts to the mother, and of
the two sisters and the mother. The trust should have
authority of the estate and control, the trust should have
and the trustee was to transfer and deliver the money of the
in the trustee hands to the surviving issue of the Continental
the rest of the property, the daughter, Rosella, and the
the daughter. The bank was appointed a trustee.
Attorney who, called by Rosella, and the bank
he called on November 18, 1900, and in testimony he said he
could not say that all the rest of the above mentioned, testi-
fied that the mother and the daughter were named in the
daughter and that the bank was given power to divide the
avoid costs of making a will. The bank was to the daughter,
Rosella, who had just been called into the room that of 1900
said that: "It might be advisable to have a will made and
and costs to make an agreement of a property, stock, etc.,
to you after the will is made, now, only, Rosella, with that
understanding, or like, agreement and understanding with you,
will you do as you have promised and agreed to do with regard
to the money of my family? Only yes, Yes, yes, I said,
'All right, Bill, and only you better have all the stock here
tomorrow. I will return to my office and draft the will.' That
he did so and returned the next day. Cook further testified that
on November 18 he asked Hettich what the stock in the several
companies which Hettich owned were worth and that Hettich replied
"Over \$200,000." This conversation as testified to by Cook, was
denied by Rosella. She testified there was never any such con-

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versation and further that there was nothing said by Cook at the time about her getting the stock certificates and other papers so as to have them at the hospital the next day; that she had about 10 days before at her father's request got the contents of the joint safety deposit box of her father and herself took them to his home in Wilmette, gave them to him but did not examine them.

August H. Hettich on behalf of plaintiffs testified that he was in his brother's room in Grant Hospital on November 14, 1930; that his two sisters and Mrs. Albert were there at the time; that he overheard a conversation between his brother and Rosella, the daughter. That Mr. Hettich there said to her: "August brought me a copy of my will. I want to make it very clear Dolly that you understand this perfectly. Dolly said, 'Yes, Daddy, I do understand it.' He said, 'Well, now you understand that I am making you trustee of this stock instead of the bank;' that Dolly said 'Yes' once."

Mrs. Franklin, sister of Mr. Hettich, called by plaintiffs testified that she was in the room of the hospital on November 14. That her brother, August, came and handed William the will he had asked for. That shortly afterward Mrs. Albert came in and her father said to her: "'Dolly, I asked Augy to go over ^{will} and get a copy out of my desk of my trust/that we talked about. You know all of the agreements, what agreements we made, and what you are supposed to do.' Now, he said, 'Here.' He handed it to Dolly. Dolly looked at it. She then handed it over to Augy who was standing at the foot of the bed." That Mrs. Albert said she understood what her agreement with her father was. Mrs. Albert denied that she was present or that there was any such conversation and defendants offered other evidence of a nurse, and the records of the hospital, tending to show there was not such a meeting on November 14.

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Mrs. von der Lippen, called by plaintiffs, testified that she was in her brother's room at the hospital on November 13; that her brother, August, and her sister, Mrs. Franklin, and some other people had been in the room; that she was not in the room at that time; she saw them coming out. She further testified that when August and Mrs. Franklin "and I went into William's room, there wasn't anybody in the room. William was in bed. He had a table across his bed. *** He said he had turned all his belongings over to Dolly and he thought that that was the better way to do it than to carry out the trust fund he had originally set up. He said, 'You know that Dolly will carry out my wishes and you will have nothing to worry about.'" On cross-examination she testified that she was not at the hospital on November 14 but was there November 13. That her husband was still working for the Standard X-Ray Company as a salesman; that he had been connected with the company for about 26 years.

There is a great deal of other evidence in the record. Defendant, Arthur Albert, testified that he had been in partnership in the practice of law with Mr. Cook; that they had been friendly for many years but that not long before the suit was brought, Cook had presented bills, one for \$1,000 and the other for \$6,900 which he expected the Alberts to pay although the services for which the \$1,000 was claimed were rendered for services which Cook claimed he had performed for Mr. Hettich in drafting the will of November 13, 1930; that he and his wife refused to pay these bills and their friendship with Cook ceased.

As stated, the evidence was voluminous, much of which we have not mentioned. The master found that plaintiffs and counterclaimants had failed to establish by any clear or

... von der Lippen, called by witnesses, testified that she was in her brother's room at the hospital on November 13; that her sister, August, and her sister, Mrs. Franklin, and some other people had been in the room; that she was not in the room at that time; she was then coming out. The further testified that when August and Mrs. Franklin "and I" were in William's room, there wasn't anybody in the room. William was in bed. He had a table across in front of him and he had turned all his belongings over to Billy. He was thinking that it was the better way to do it than to carry out the things. There he had originally set up. He said, "You know that Billy will carry out my wishes and you will have nothing to worry about." In cross-examination she testified that she was not at the hospital on November 13 and that on November 13, the day her husband was still working for the Standard Oil Company as a salesman; that he had been connected with the company for about 15 years.

There is a great deal of other evidence in the record. Defendant, Arthur Albert, testified that he was present in person in the office of the first Mr. Cook; that they had been friendly for many years but that not long before the suit was brought, Cook had presented him, one for \$1,000 and the other for \$5,000 which he expected the libelers to pay although the services which Cook claimed he had performed for Mr. Hettich in drafting the will of November 13, 1900; that he and his wife refused to pay those bills and their relationship with Cook ceased.

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satisfactory proof any intent on the part of Mr. Hettich to create a trust on or about November 13, 1930, and recommended that the complaint and counterclaim be dismissed for want of equity. His finding and recommendation were approved by the chancellor. We have considered all the evidence in the record. The claimed oral trust was made November, 1930, and the suit was not brought until November 12, 1941, a period of 11 years. We are of opinion that the evidence sustains the finding of the master and the chancellor.

Counsel for both sides agree that in order to establish a trust by parol evidence the proof must be clear and convincing. This is the correct statement of the law. Cusack v. Cusack, 339 Ill. 108. In that case the court said: (p. 120) "Where it is sought to establish a trust by parol evidence, the proof must be clear, convincing and so strong, unequivocal and unmistakable as to lead to but one conclusion, and if the evidence is doubtful or capable of reasonable explanation upon theories other than the existence of a trust it is not sufficient. Wies v. O'Horow, 337 Ill. 267.)"

Counsel for plaintiffs and counterclaimants further contend that: "The chancellor fixed the master's fees at \$630.00 in excess of the amount legally allowable." The master itemizes his charges as follows: "Statutory Fees: 3048 folios of oral evidence @ 15¢ per folio, \$457.00; 950 folios for documentary evidence @ 15¢ per folio, \$142.50" making \$599.50. The item of \$630 objected to, the master states, is for "Attendance at hearings. Proofs were commenced on April 10, 1942, and closed on June 16, 1943. Time spent in attendance, 63 hours." Then follows another item which the master specifies was for considering the testimony, studying briefs of the parties, preparation of his report, etc., which required 150 hours,

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for which he claimed \$10 per hour and which sum was allowed by the court and to which no objection is made. The total allowance made to the master was \$2,829.50. The objection to the item of \$630 must be sustained. Jay-Bee Realty Corp. v. Agricultural Ins. Co., 320 Ill. App. 310.

Complaint is also made that the court erroneously entered an order January 12, 1944, awarding Mrs. Albert judgment for costs against certain plaintiffs and counterclaimants for \$2,329.50 which amount Mrs. Albert had paid the master and which was the balance due the master after giving credit for \$500 which had theretofore been paid by defendants, August Hettich and his two sisters, Mrs. Franklin and Mrs. von der Lippen. The final decree was entered January 11, 1944, by which it was decreed that the suit be dismissed for want of equity "At the costs of plaintiffs and counterclaimants." And it was further ordered that all costs were to be taxed against the plaintiffs and counterclaimants and the court reserved jurisdiction for that purpose. We think there was no reversible error in these orders but since we have above held that the master's fees must be reduced \$630, the amount of costs should be altered accordingly.

Plaintiffs and counterclaimants further contend that the court erred in denying the petition for a change of venue of William G. Hettich, a minor, who by leave of court, intervened in the cause December 10, 1943, as co-plaintiff. He filed his petition for the change of venue March 20, 1944. The final decree was entered January 11, 1944. The record discloses that on December 17, 1941, an order was entered by Judge Rush before whom the cause was then pending, which recited that on motion and petition of plaintiffs for a change of venue it was ordered that the cause be transferred to the executive committee for reassignment. Afterward the cause appeared on other judges'

for which he claimed \$12 per hour and which sum was allowed by the court and to which no objection is made. The total allowance made to the master was \$2,320.50. The objection to the item of \$630 must be sustained. Jay-Bee Realty Corp. v. Agricultural Ins. Co., 320 Ill. App. 210.

Complaint is also made that the court erroneously entered an order January 12, 1944, awarding Mrs. Albert judgment for costs against certain plaintiffs and counterclaimants for \$2,320.50 which amount Mrs. Albert had paid the master and which was the balance due the master after giving credit for \$630 which had theretofore been paid by defendants, August Hettich and his two sisters, Mrs. Franklin and Mrs. von der Lippe. The final decree was entered January 11, 1944, by which it was decreed that the suit be dismissed for want of equity "at the costs of plaintiffs and counterclaimants," and it was further ordered that all costs were to be taxed against the plaintiffs and counterclaimants and the court reserved jurisdiction for that purpose. We think there was no reversible error in these orders, but since we have above held that the master's fees must be reduced \$630, the amount of costs should be altered accordingly.

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calendars and finally came before Judge LaBuy. After he entered the final decree January 11, 1944, the petition was filed as above stated. In support of their contention counsel in their brief, in speaking of the order entered by Judge Rush say: "A change of venue is not granted, effective or made short of removal of the case from Cook County. If, for illustration, the change is granted to Lake County, the venue is changed from State of Ill., Cook Co. to State of Ill., Lake Co., and the moving party has had, 'one change of venue.'" We think there is no merit in this contention. §2, ch. 146, Ill. Rev. Stat. 1943. Under the facts in the case we think the petition for the second change of venue was properly denied.

The decree of the Circuit court of Cook county is affirmed in all things except that the item of \$630 awarded the master as part of his fees should be eliminated.

In view of the whole record before us we are of opinion that all of the costs should be borne by plaintiffs and counter-claimants.

AFFIRMED IN PART REVERSED IN
PART AND REMANDED.

Niemeyer, P.J., and Matchett, J., concur.

celebrated and timely occasion. The fact that the
 entered the first record January 11, 1944, the
 filed as above stated. In view of the fact that the
 in their order, it is noted that the first
 was not. The change of venue is not a matter of course
 short of removal of the case from the court. It is
 that the change is made to the court. The fact that
 from the date of filing, the case was not removed
 the moving party and the court. The fact that the
 to no effect in the record. It is noted that the
 fact that the case was not removed from the court.
 the record of the case is not a matter of course.
 in view of the fact that the case was not removed
 removed from the court. The fact that the case was
 removed as part of the record. The fact that the
 in view of the fact that the case was not removed
 that it is not a matter of course. The fact that the
 removed.

Since

however, the fact that the case was not removed
 fact contained that the
 a change of venue of
 ave of court, intervened
 o-plaintiff. He filed his
 March 20, 1944. The fact
 1944. The record discloses that
 was entered by Judge Nash before
 nothing, which recited that on motion
 for a change of venue it was ordered
 transferred to the executive committee for
 the cause appeared on other judges.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

324 I.A. 158

OCTOBER TERM, A. D., 1943

BERNADINE BISSEKUMER,
APPELLANT,
vs.
ROGER BISSEKUMER,
APPELLEE.

APPEAL FROM
CIRCUIT COURT OF
WINNEBAGO COUNTY

Dove, P.J.:

On January 16, 1943, appellant brought a suit against appellee, her husband, in the circuit court of Winnebago County, for divorce on the grounds of habitual drunkenness and extreme and repeated cruelty, and there was a trial by jury. At the close of the testimony for appellant the trial court directed a verdict for appellee on the charge of habitual drunkenness, a verdict responsive thereto was returned, and at the close of all the testimony the jury returned a verdict for appellee on the charge of extreme and repeated cruelty. The court denied appellant's motion for judgment notwithstanding the verdict, and, in the alternative, for a new trial, and entered an order dismissing the complaint for want of equity, from which order appellant has prosecuted this appeal.

The parties were married on February 6, 1935, Appellant was then in her twentieth year, and appellee, a physician and surgeon, was forty one years of age. Appellant was raised on a farm, graduated from a community high school, and entered upon a three year

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nurses' training at St. John's Hospital in Rockford, where she became acquainted with appellee. They were married while she was a senior undergraduate, and she became a registered nurse in the spring of that year. She had never been previously married. One child was born to the union about eighteen months after the marriage. Appellee had been married twice previously and there were two children by one of the former marriages, one of the children being four years old and the other being sixteen months old. All of the children lived with the parties.

The first ground urged for reversal is that the court erred in directing a verdict for appellee on the charge of habitual drunkenness. One of the statutory grounds for divorce is that the defendant "has been guilty of habitual drunkenness for the space of two years." (Ill. Rev. Stat. 1943, chap. 40, par. 1). The uncontradicted evidence shows that for a period starting four or five months after the marriage, appellee was intoxicated about twice a week, up ^{to} February, 1941, at which time appellant instituted a suit against him for separate maintenance, whereupon he sought through appellant's mother and a mutual friend, to bring about a reconciliation. He promised appellant and her mother to abstain from drinking, and on his knees before the pastor of his church made a pledge that he would not drink any intoxicating liquor for one year, the time being suggested by the pastor, in place of appellee's proposal to make a pledge for life. Thereupon the parties resumed their relation and appellant dismissed the separate maintenance suit. He began drinking again ⁱⁿ about one month thereafter, without the knowledge of appellant. A practical nurse employed in the home of the parties for eleven months testified that she saw him drink about an ounce and a half of whiskey in the Butler's pantry, in the morning on March 15, 1941, the day after she came there to work; that thereafter, she saw him drink at the house for three or four

months, but never in appellant's presence, and that she did not see him drunk during that time, but saw him drunk several times afterward. Appellant testified that the first time she knew appellee had resumed drinking was in the middle of the summer in 1941, about July, at the Germania Club, where, when he left the table, she finished drinking her glass of root beer, took a sip from his glass and found that the root beer therein contained whiskey; that thereafter he was intoxicated three or four times a week up to the time this suit was started. The unprintable details of his conduct on several of such occasions are shockingly indecent and revolting.

The acts of cruelty charged are alleged to have been committed while he was intoxicated.

The evidence shows that appellant occasionally drank intoxicating liquor with appellee and others with whom they would be in company, and some of the occasions were after she learned that appellee had resumed drinking. Before the marriage, appellant went out frequently with appellee, and she had taken intoxicating liquor with him on four of such occasions. She had seen him intoxicated several times prior to the marriage, but never when they were out together. She testified that she has never been intoxicated, or under the influence of intoxicating liquor to any degree, and that on occasions when she took intoxicating liquor she would take one high ball sometimes two, occasionally three, and never more than that.

Appellee's answer to the complaint alleged mutual fault by appellant's drinking, and the reply, traversing the allegations of the answer, further set out that appellant used intoxicating liquor only to the extent that it was necessary to remain in appellee's company and to avoid demonstrations of irritability and violence on his part; that appellee was a man of diversified interests and affairs, and social connections and contacts, and that appellant had previously

months, but never in appellant's presence and the day after
him during that time. But she did not know of his presence
ward. A letter dated the third time she was in the
had resumed drinking was in the middle of the year in 1931, about
July, at the Germania Club, where, when he is in the city, he
finished with a glass of port beer, and at the same time
and found that the room was empty. He was in the room
after he was informed that he was in the room. He was in the room
this time was a letter. The letter was dated the same day as
several of these occasions and on the highly confidential matter.
The case is a matter of fact and is a matter of fact and is a
he was intoxicated.
The following is a list of the places where he was
intoxicated and the places where he was not intoxicated.
and some of the places where he was not intoxicated.
resumed drinking. He was in the room and was not
in with appellant and was not in the room. He was in the room
on the day of the incident. He was in the room and was not
times prior to the incident, but never when he was in the room.
the testimony that he was never in a intoxicated, or when he
influence of intoxicating liquor to any degree, and that he was not
when the fact of intoxicating liquor she was in the room and was not
times two, occasionally three, and never more than three.
Appellant's answer to the question of whether he was in the room
appellant's drinking, and the reply, "I was not in the room."
the answer, further set out that appellant was not intoxicated prior
only to the extent that it was necessary to remain in the room.
company and to avoid demonstrating a sympathy and alliance
his part; that appellant was a man of distinguished interests and affairs,
and social connections and contacts, and that he often was socially

led a restricted life and was led by appellee into the paths of his habits and pastimes; and that their married life had been a continual struggle by her to save and preserve appellee from the vicious consequences of his excessive use of intoxicating liquor. The court sustained objections to appellant's offer of proof in support of the above allegations of her reply.

Appellee claims, and the court held, as one of the reasons for directing a verdict for appellee on the charge of habitual drunkenness that under the statutory charge of habitual drunkenness for the space of two years, it is necessary to prove the charge for a continuous period of two years next prior to the filing of the complaint, and that the proofs showed appellee had "reformed" for about seven months during that period; also, that the evidence showed that appellant continuously drank with appellee, and did not attempt to persuade him to discontinue his drinking, and thereby forfeited any right to come into a court of equity and ask for any relief on the charge of habitual drunkenness.

The trial court was in error in its holding as to the proof required to establish habitual drunkenness. The law is summarized in the recent case of *Holmstedt v. Holmstedt*, 383 Ill. 290, 297, where the court said in the opinion: "Evidence that a party had been drunk from three to five times in two years, has been held sufficient proof of habitual drunkenness. *Murphy v. People*, 90 Ill. 59.) Evidence of intoxication without intermission is not necessary to prove habitual drunkenness, nor does the fact that appellee voluntarily abstained for short periods, indicate that he was not guilty of habitual drunkenness. (*Dorian v. Dorian*, 298 Ill. 24.)" It is also well settled that condonation of the violation of the marital duties and obligations is conditioned on the future good conduct of the offending spouse, and a subsequent offense on his or her part revokes or nullifies the condonation and revives the original offense

led a restricted life and was led by appeals into the paths of his habits and pastimes; and that their married life had been a continual struggle by her to save and preserve herself from the vicious consequences of his excessive use of intoxicating liquors. The court sustained objections to appellant's offer of proof in support of

the above allegations of her reply.

"Appellee claims, and the court held, as one of the reasons for directing a verdict for a crime in the charge of habitual drunkenness that under the statutory charge of habitual drunkenness for the space of two years, it is necessary to show the charge for a continuous period of two years next prior to the filing of the complaint, and that the proofs showed appellee had 'relapsed' for about seven months during that period; also, that the evidence showed that appellee continuously drank with appellee, and did not state any periods him to discontinue his drinking, and thereby forfeited any right to come into a court of equity to ask for any relief on the charge of habitual drunkenness.

The trial court was in error in its holding as to the proof required to establish habitual drunkenness. The law is summarized in the recent case of *Holmstedt v. Holmstedt*, 213 Ill. 230, 1897, where the court said in the opinion: "Evidence that a party had been drunk from three to five times in five years, and been held sufficient proof of habitual drunkenness." *Whitney v. Apple*, 90 Ill. 239. Evidence of intoxication without admission is not necessary to prove habitual drunkenness, nor does the fact that appellee voluntarily abstained for short periods, indicate that he was not guilty of habitual drunkenness. (*Dorian v. Dorian*, 233 Ill. 247.) It is also well settled that condonation of the violation of the marital duties and obligations is conditioned on the future good conduct of the offending spouse, and a subsequent offense on his or her part revokes or nullifies the condonation and revives the original offense

as a cause for divorce. In other words, condonation is no defense in a divorce suit where the condoned offense is repeated. (Lipe v. Lipe, 327 Ill. 39, 42, 43; Young v. Young, 323 id. 608, 613, 614; 17 Am. Jur. "Divorce and Separation, sec. 213.) The right to rely upon habitual drunkenness as a ground for divorce may be revived after condonation *by* a persistence of the husband in his drunken habits. (17 Am. Jur. Supra, sec. 218). Nor did the evidence justify taking the question of habitual drunkenness away from the jury on the ground of mutual fault. That question was at issue under the pleadings, but appellant was denied the right to make any proofs thereunder. Appellant's counsel also offered to prove that in the month of October, 1942, appellant contemplated leaving appellee on account of his misconduct, but that he told her he was applying for a commission in the Medical Corps of the Army, and that she forebore taking any action in the hope that if he was accepted for military service, the duties would be such as to reform him and *cause* him to decrease the use of intoxicating liquor, if not to abstain entirely. The court denied the offer *of* proof, and sustained objection to testimony that after a pellee was rejected for military service, appellant went to Mr. Carl Welsh to see if, as a friend, he could do something with appellee to make him stop drinking, and as to what was done about it. All of such testimony was competent and relevant under the issues, and the court ~~erred~~ *erred* in denying its admission in evidence. So far as the record shows, it might, if admitted, have been sufficient to wholly exonerate appellant from the charge of mutual fault, and she *should* ~~not~~ not be deprived of the right to have the jury consider that question. Furthermore, drinking by a wife in order to constitute a defense to a charge of habitual drunkenness on the part of the husband, must in and of itself extend to a greater degree than is shown in this case. (Garrett V. Garrett, 252, Ill. 318, 325-327.)

The complaint alleges acts of cruelty on March 1, 1936, January 25, 1941, January 3, 1943, and on numerous other times and occasions. The first charge concerns an occurrence in the apartment of Mr. and Mrs. P. O. Hunter, who lived upstairs in the same building where the parties to this cause lived on the floor below. Whether it was on March first or May first, seems somewhat uncertain, but the testimony shows that late in the afternoon appellee made a professional call and Mr. Hunter went with him, after they had had several drinks of intoxicating liquor, and upon returning they went up to the Hunter apartment. Both of them were intoxicated. Some time later appellant and Mrs. Hunter came into the room. Appellee was sitting in a large chair eating a leg of roast chicken which Mr. Hunter had given him. As appellant came in she said to appellee: "So this is where you are, you drunken sow", slapped his face smartly twice and tried to pull him up out of the chair. He slumped down onto the floor and sat there a few minutes, during which she kicked him a couple of times, and told him to "get on out of here and go down home where you belong". He finally got up, walked to the door of the room without assistance, and as appellant followed him, he turned and struck her in the face with his fist, knocking her down with such force that she was momentarily unconscious. Appellee does not deny this occurrence, and admitted in his testimony that he was angry at appellant when he struck her. He and Mr. Hunter testified that appellant kicked him again just before he struck her, but Mrs. Hunter testified she did not see such an occurrence and appellant denied it. Considering the fact that both men were intoxicated, and that Mrs. Hunter did not see any such occurrence, although she was there all the time, the weight of the credible evidence shows that appellant did not kick appellee just before he knocked her down. Although he claims she kicked him with considerable

force while he sat on the floor, her testimony and that of Mrs. Hunter indicates the kicks were not violent, and were intended to stir appellant to rise. Even in cases where the wife has been at fault, the violence of the husband must not be out of all proportion to the provocation, and if it is, she will be entitled to a decree. (Von Glahn v. Von Glahn, 46 Ill. 134.)

As to the charge of the occurrence on January 25, 1941, the testimony shows that while the parties were at the Germania Club, appellee became intoxicated, and they started home about one o'clock A. M. Appellant testified that she got into the driver's seat of the car, and had not closed the car door on her side; that she asked appellee for the keys, and he hit her in the face several times, suddenly giving her a violent push out of the car and she fell on her left wrist, breaking her forearm. She started back to the club house for help, and at her request, an acquaintance, a Mr. Carver, drove the car home, taking appellee along while Mrs. Carver took appellant home in the Carver car. Appellee testified that he did not strike appellant or push her out of the car, and that the first he knew of her injury was when she ^{wrote him up the next morning to tell him about it and that she} did not charge him with being the cause of it until approximately a week later. Mrs. Carver testified that appellant did not say anything to her about her arm, and that when appellant was going up the steps at home she pitched forward onto her hands there being some snow on the slippery ice. Appellant testified she did not tell either Mr. or Mrs. Carver that appellee had struck her or pushed her out of the car, and that she had no difficulty in getting out of the Carver car and did not slip at all; that her arm pained her intensely, but she did not realize that it was broken until x-rays were taken the following day; that she walked the floor most of the night with pain, and that appellant went to bed fully dressed and did not get up until noon the following day. He testified that he did not ask her how her arm got broken.

force while he sat on the floor, her testimony in view of what

Hunter indicates the force was not violent, and the force

to still herself in place. Even in cases where the wife is

at fault, the violence of the husband does not make the

property of the husband, and it is not established

to a degree. (See also, *W. V. v. W. V.*, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

as of the time of the commission of the crime, and

testimony which the jury is to consider in

applying the law to the facts, and the jury

A. M. Williams testified that he did not

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broken until X-rays were taken, and

the floor west of the light, and

bed fully dressed and did not get up until noon the following day.

He testified that he did not ask her how she felt.

It is plausible to conceive that appellant did not tell the Carvers of the assault by appellee from a sense of pride and to avoid a scandal. ~~and some other reasons~~

These two occurrences took place prior to the filing of the separate maintenance suit, in which these same acts of violence were alleged as extreme and repeated cruelty, as well as a charge of habitual drunkenness. When appellee importuned appellant's mother to help him with a reconciliation, she refused several times to do so, and told him: "Roger, Bernadine is all I have, and I don't want to see her abused by a drunken husband, " to which he replied that he had never abused her or laid a hand on her except when he was "stone drunk", and further said: "Mother, won't you please help me out? If you don't, nobody can, for I am guilty as hell." Upon this record of his admission, it is futile for him to now deny the assaults upon these two occasions, or to attempt justification by reason of provocation.

The practical nurse above mentioned, who was employed in the household, testified that about midnight during September, 1941, she heard appellant crying and repeatedly saying: "Don't strike me again;" ~~for some while, and~~ that appellant came out of a room and ran down stairs, while appellee tried to get to the bath room, but was unable to do so, and ^{that appellee} "threw up all over everywhere." She further testified that in January, 1942, appellant went out into the yard to assist appellee in getting the car into the garage while he was intoxicated, and he slapped her, after which she managed to get the car in, and got him into the house, where he lay down on the floor in the hall and went to sleep.

As to the charge of cruelty on January 3, 1943, it could serve no good purpose to depict the details of the beastly assault on appellant in the early morning, finally terminating with his hitting her in the head with his fist, after she ^{had} gone to bed in

another room in the middle of the night, following repeated intercourse at his insistence. According to the abstract he did not deny any of the testimony concerning this incident, except that he denied using the profane threat to which she testified and denied "striking her three or four times before she began to holler."

In addition to the above appellant testified that during the first year of their marriage, appellee surreptitiously poured acid in her hair, making it smell like it had been burned because he did not like permanent waves and wanted her to thin her hair had been burned. Under the allegations of the complaint charging acts of cruelty on other occasions than the three specifically alleged, the court erred in striking the testimony as to this item on the ground that it was not charged in the complaint. In many other instances, complained of by appellant, too numerous to specifically mention, the court sustained objections to questions propounded to witnesses by appellant's counsel. In practically every instance the testimony was competent and relevant and should have been admitted.

Several instructions given at appellee's request are complained of by appellant. The fourth told the jury that for extreme and repeated cruelty to constitute a ground for divorce, the cruelty must be grave and subject the person to great bodily harm. That is not a correct statement of the law. ~~which is that~~ Cruelty constituting a ground for divorce under the statute means physical acts of violence, bodily harm or suffering, or such acts as endanger life or limb or such as raise a reasonable apprehension of great bodily harm. (Wesselhoeft v. Wesselhoeft, 369 Ill. 419, 424; Moore v. Moore, 362 id. 177, 180.) Although an instruction given at appellee's request stated the law correctly, there is no way of telling which one ~~of~~ the jury followed, and the giving of the incorrect instruction was error.

~~Wesselhoeft v. Wesselhoeft, 379 Mo. 617, 620 (1919) The reversal was based on the error in the instruction and the error in the instruction.~~

The second instruction^{of} that series is to the effect that even if the defendant has been guilty of violence against his wife, still if the jury believe that his acts were "provoked by ^{the} plaintiff's misconduct" ^{then such act so provoked by plaintiff's misconduct} should not be considered as an act of extreme and repeated cruelty, and the jury should not find the defendant guilty by reason of such act of violence, providing such misconduct is proven to have been of such character as might be reasonably expected to provoke the act charged against the plaintiff. Under the doctrine in the Von Glahn case, supra, the instruction was erroneous. The jury were not told what misconduct of the plaintiff would justify violence on the part of the defendant. ~~They might well have understood the field and have taken the instruction to mean that calling a spouse a "damned son" was sufficient to provoke his assault upon a wife on the occasion.~~ The law is well settled that provocative, abusive or insulting language or even threats without some overt act, do not justify an assault or mitigate its consequences. (Wesselhoeft v. Wesselhoeft, supra.) The instruction in effect directed a verdict, and consequently was not cured by any other given instruction.

Another of the instructions told the jury that the law will not permit a person by her misconduct to wantonly provoke injury and make the injury thus received a ground for divorce, unless the injury is out of all reasonable proportion to the provocation. This instruction was erroneous for the same reason as instruction No. 2. In addition, it assumes wantonness on the part of the appellant.

For the reasons above mentioned, the order dismissing the complaint for want of equity is reversed and the cause is remanded^{generally} for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

~~CONFIDENTIAL~~ ~~SECRET~~ ~~TOP SECRET~~

The second section of the report is devoted to a discussion of the results of the investigation.

It is found that the results of the investigation are in general in accordance with the findings of the first section.

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Abstract

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STATE OF ILLINOIS

APPELLATE COURT

October
Term, A.D. 1944

32 - 1A. 158²

Term No. 9439.

Agenda No. 7.

(Gay Gorrell) Now)
Gay Roley McClelland,)
Plaintiff-Appellant,)
-vs-)
May Gorrell Roley, et al.,)
Defendant- Appellees.)

Appeal from the
Circuit Court of
Piatt County,
Illinois.

1453

Dady, P. J.

Alva Gorrell, a resident of Monticello, Piatt County, Illinois, died on December 8, 1939, leaving a will which was duly admitted to record and probate in said county.

So far as is material, said will provided that: " * * * Gay Gorrell my wife shall have my property 618 East Center Street as long as she is my widow her natural life and at her death it goes back to the Gorrell except Iva Primmer and Flora Boyd shall not share in property. Clarence Gorrell shall Rec my property on E. Center Street called the lowery property Gay Gorrell wife shall Rec one thousand dollar-- 1000.00 to be held by Clarence Gorrell in trust and to spend for her support as he see fit and to keep up property and if Gay Gorrell should die before this money is spent it shall go to Ethel Strohl what is left. * * * Clarence Gorrell shall be my administrator to serve without bond * * *."

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4. *Conclusions*

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

44-763

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 84

Journal of Interpersonal Violence 26(10)

to the Council of Europe and the Council of the Americas.

~~The following information is confidential.~~

called the "Secret Project" and was only being

[illegible]

15. You witness a fight at the club and see an American and two boys

of 27 June 1964. There is no other data noted for Alaska Station 740.

you do have them covered. . . .

10. 12 1/2 x 8 inch double ended or intermediate

Alva Gorrell and Gay Gorrell were never legally married to each other, but they lived together, apparently as husband and wife, in Monticello, Illinois, from 1933 until the death of Alva Gorrell, in a home at 218 East Bond Street, purchased by Alva Gorrell. The purchase price was \$3500. The title to such home was taken in the name of Alva Gorrell.

After the death of Alva Gorrell, Gay Gorrell instituted this proceeding in the circuit court, making all legatees and devisees of the testator parties defendant. She has since remarried and is now known as Gay McClelland, but she will hereafter be referred to as Gay Gorrell or as the plaintiff.

The case was tried on an amended complaint filed by Gay Gorrell and the answer thereto, and on a counter-claim filed by the devisees of Alva Gorrell, and the answer of Gay Gorrell thereto.

Such complaint, so far as is material, alleged that before Alva Gorrell purchased such real estate and after he and the plaintiff had gone through an alleged marriage ceremony, the plaintiff had given him \$950.00 for investment purposes only, that as a matter of fact Alva Gorrell used such \$950.00 in the purchase of such real estate, but that the plaintiff did not learn of such use of such money until about August 11, 1942.

The amended complaint also set up the provisions of said will, alleging that the true meaning and intent of the above quoted part of such will was that Clarence Gorrell, as Trustee, should reasonably use and expend the \$1,000 trust fund for the support of the plaintiff, that Clarence Gorrell had not paid her anything under such provision and would not do so unless compelled by order of court, but would keep such \$1,000 and appropriate it to himself or divide it among the other heirs of the decedent, and that

Alvin Correll and Gay Correll were never legally married to each other, but they lived together, apparently as husband and wife, in Monticello, Illinois, from 1923 until the death of Alvin Correll. In a home at 212 East Bond Street, purchased by Alvin Correll. The purchase price was \$2500. The title to such home was taken in the name of Alvin Correll.

After the death of Alvin Correll, Gay Correll instituted this proceeding in the circuit court, making all legacies and divisions of the testator's estate. The two sides remained and is now known as Gay Correll, but the will mentioned as referred to as Gay Correll or as the plaintiff.

The case was tried on an amended complaint filed by Gay Correll and the answer thereto, and on a counter-claim filed by the defendant of Alvin Correll, and the answer to Gay Correll thereto.

Such complaint, so far as is material, alleged that before Alvin Correll purchased such real estate and after he and the plaintiff had gone through an alleged marriage ceremony, the plaintiff had given him \$250.00 for investment purposes only, that as a matter of fact Alvin Correll used such \$250.00 in the purchase of such real estate, but that the plaintiff did not learn of such use of such money until about August 11, 1923.

The amended complaint also set up the provisions of said will, alleging that the true meaning and intent of the above quoted part of such will was that Clarence Correll, as trustee, should reasonably use and expend the \$1,000 trust fund for the support of the plaintiff, that Clarence Correll had not paid her anything under such provision and would not do so unless compelled by order of court, but would keep such \$1,000 and appropriate it to himself on divide it among the other heirs of the decedent, and that

Clarence Gorrell did not have sufficient property "for it to be good business that he have and control such \$1,000 without giving bond."

The complaint prayed that the plaintiff be declared to be the equitable owner of said real estate in the proportion that such \$950.00 bore toward the purchase price, prayed for partition and that Clarence Gorrell, as Trustee, be required to give bond.

The complaint also prayed, in the alternative, that it be decreed that the estate of said decedent was indebted to her for such \$950.00 plus interest, and that she be given a lien on such real estate for such amount.

The answer denied there was any alleged marriage ceremony, denied that the plaintiff entrusted to said Alva Gorrell such \$950.00, and denied that plaintiff was entitled to partition or other relief.

The answer further denied that Clarence Gorrell was not responsible financially, and denied that he should be required to furnish a bond as trustee.

Such answer admitted that Clarence Gorrell, as trustee, had not paid her anything, but alleged that under the terms of such will Clarence Gorrell, as such trustee, was required to pay her such sum as he saw fit for her support.

The devisees of the real estate in question filed a counter-claim alleging therein that Gay Gorrell had filed in the recorder's office an affidavit in and by which she claimed to be the owner of such real estate. Such counter-claim also alleged that Gay Gorrell had been in possession of such real estate from December 8, 1939, to May 29, 1942, that the reasonable rental thereof was \$30.00

Glenn Gervais did not have sufficient property "for it to be good business that he have and control such \$1,000,000 amount giving bond."

The complaint prayed that the plaintiff be declared to be the equitable owner of said real estate in the proportion that each \$250.00 bore toward the purchase price, subject for partition and that Glenn Gervais, as Trustee, be required to give bond. The complaint also prayed, in the alternative, that it be decreed that the estate of said defendant was indebted to her for each \$250.00 plus interest, and that she be given a lien on such real estate for such amount.

The answer denied there was any alleged mortgage conveyance. It denied that the plaintiff entrusted to said Gervais such \$250.00, and denied that plaintiff was entitled to partition or other relief.

The answer further stated that Glenn Gervais was not responsible financially, and denied that he would be required to furnish a bond as trustee.

Such answer admitted that Glenn Gervais, as Trustee, had not paid her anything, but alleged that under the terms of such will Glenn Gervais, as such Trustee, was required to pay her such sum as he saw fit for her support.

The answer of the real estate in question filed a counter-claim alleging therein that Gervais had filed in the recorder's office an affidavit in and by which she claimed to be the owner of such real estate. Such counter-claim also alleged that Gervais had been in possession of such real estate from November 8, 1935, to May 22, 1943, that the responsible rental thereof was \$30.00

per month, and that Gay Gorrell had paid only one month's rental of \$30.00. The counter-claim asked that such recorded instrument be removed as a cloud on the title, and asked that Gay Gorrell be required to pay the rental due.

The answer to such counter-claim admitted the recording of such instrument, admitted such occupancy of the real estate, and admitted that \$30.00 per month was a reasonable rental, but denied that counter-claimants were entitled to any relief.

The case was referred to a master in chancery who heard the proofs and made his report. The chancellor entered a decree overruling all exceptions to such report, and approving such report. The decree found that the plaintiff had not proved the allegations of her complaint as to such \$950.00, that she was not entitled to any lien on said premises, that such recorded instrument was a cloud on the title and should be removed, that counter-claimants should have a judgment for \$60.00 as accrued rent, that plaintiff's demand for a bond from Clarence Gorrell, as trustee, was premature, that the estate of Alva Gorrell was still pending in the probate court, that nothing was due the plaintiff from the trustee until the probate of such estate was closed, and "that the true meaning and intent" of such above quoted part of the will of Alva Gorrell "is that said sum of \$1,000 should be held by Clarence Gorrell, as trustee, and used for the support of the said plaintiff at such times and in such amounts as he shall deem fit in his discretion; that the matter of when the trustee shall make payments, or in what amounts, is not a proper subject of inquiry by the court at this time, and will not be a proper subject of inquiry in the future unless the cestui shall have cause for complaint after the trustee receives the corpus of the trust and thereafter

per month, and that Guy Correll had paid only one month's rental
of \$50.00. The counter-claim asked that such reported payment
be removed as a claim on the title, and asked that Guy Correll be
required to pay the rental due.

The answer to such counter-claim admitted the recording of
such instrument, admitted such ownership of the land, and
admitted that \$50.00 per month was a reasonable rental, but stated
that counter-claimants were entitled to no relief.
The case was referred to a master to state by what means the
proofs and facts were established. The commission ordered a decree
overruling all exceptions to such report, and removing such report.
The decree found that the plaintiff had not proved the allegations
of her complaint as to such \$50.00, that she was not entitled to
any lien on said premises, that such reported payment was not a
claim on the title and should be removed, that counter-claimants
should have a judgment for \$50.00 as agreed upon, that plaintiff's
demand for a fund from Clarence Correll, as trustee, was premature,
that the estate of Alice Correll was still pending in the probate
court, that nothing was due the plaintiff from the trustee until
the probate of such estate was closed, and that the true meaning
and intent of such above stated part of the will of Alice Correll
"is that said sum of \$1,000 should be held by Clarence Correll,
as trustee, and used for the support of the said plaintiff at
such times and in such amounts as he shall deem fit in his
discretion; that the matter of when the trustee shall make payments,
or in what amount, is not a proper subject of inquiry by the
court at this time; and will not be a proper subject of inquiry
in the future unless the court shall have cause for complaint
after the trustee receives the corpus of the fund and thereafter

fails to carry out the terms of said trust."

The decree then dismissed the amended complaint for want of equity "without prejudice to a future suit to construe the will of Alva Gorrell in any respect that may be proper under the law, said construction to have no effect on the title to the real estate involved in this present suit."

The decree also decreed that by reason of the provisions of the will the cross-claimants Clarence Gorrell, Ethel Strohl, Ava Secrist and Virgil Gorrell, as devisees therein named, were the owners of said real estate, decreed that the plaintiff had no interest therein, and decreed that said recorded instrument be removed as a cloud on the title.

The decree further decreed that said counter-claimants have judgment against the plaintiff for \$60.00 as accrued and unpaid rent, and the decree ordered that \$124.00 of the court costs be taxed against the plaintiff and that the balance of the costs, amounting to \$47.40, be taxed against said counter-claimants.

The plaintiff has brought this appeal and the counter-claimants have assigned cross error.

Daisy Gordon testified that she first became acquainted with Alva Gorrell and the plaintiff about 1935, and thereafter visited them about four or five times each year while they lived at 218 East Bond Street; that in November, 1938, she and Bernice Dunn were visiting in such home, and she, Daisy Gordon, said to Alva Gorrell, " 'You have a beautiful home here,' and he said, 'Yes, but I don't like it, but since I put Gay's money in it, which was about \$950.00,' he says he bought it for her and 'she likes it all right, and she can live here,' but he didn't like the place."

to copy out the terms of said trust."

The decree then dissolved the amended complaint for want of equity "without prejudice to a future suit to construe the will of Alva Correll in any respect that may be proper under the law, said construction to have no effect on the title to the real estate involved in this present suit."

The decree also decreed that by reason of the provisions of the will the cross-claimants claimed Correll, Ethel Correll, and Gertrude and Virgil Correll, as devisees therein named, were the owners of said real estate, decreed that the plaintiff had no interest therein, and decreed that said recorded instrument be removed as a cloud on the title.

The decree further decreed that said counter-claimants have judgment against the plaintiff for \$80.00 as awarded and unpaid rent, and the decree ordered that \$184.00 of the cost costs be taxed against the plaintiff and that the balance of the costs, amounting to \$47.40, be taxed against said counter-claimants. The plaintiff has brought this appeal and the counter-claimants have assigned cross error.

Daisy Gordon testified that she first became acquainted with Alva Correll and the plaintiff about 1935, and thereafter visited them about four or five times each year while they lived at 218 West Bond Street, that in November, 1938, she and Bernice Dunn were visiting in their home, and also, Daisy Gordon, said to Alva Correll, "You have a beautiful home here," and he said, "Yes, but I don't like it, but since I put my money in it, which was about \$80.00, he says he bought it for her and 'she likes it all right, and she can live here,' but he didn't like the place."

Bernice Dunn testified that she had known the plaintiff for about four years and saw the plaintiff once or twice a year; that she first met Alva Gorrell in November, 1938, at a time when Daisy Gordon was present in such home; that on that occasion "Mrs. Gordon was admiring the home when Mr. Gorrell said he didn't like it himself but he had put in \$950.00 of Mrs. Gorrell's money and said she liked it so therefore he bought it for her."

Ollie Plankenhorn testified that he had known Alva Gorrell for twenty five or thirty years, and for the last few years lived across the street from Alva Gorrell; that in the spring of 1939 he had a conversation with Alva Gorrell regarding the purchase of such property; that on such occasion Alva Gorrell told him "that he didn't like to live down there and he said the only reason he bought this place was that he thought if anything happened to him it would be a good place for his wife to make a living keeping roomers, being close to the school house."

The foregoing is all of the evidence tending to show that Gay Gorrell advanced or entrusted \$950.00 or any other sum of money to Alva Gorrell for the purchase of such real estate or for any other purpose.

It is our opinion that the chancellor was justified in finding that the plaintiff had not proved the allegations of her complaint as to such \$950.00, and in decreeing that she was not entitled to any relief in that respect. Testimony of such character must be received with caution and must be carefully scrutinized, and is dangerous because it is liable to abuse, and such testimony, although uncontradicted, may be rejected if not clear and convincing. (See Kosakowski, v. Bagdon, 369 Ill. 252;

Barbara Dean testified that she had known the plaintiff for about four years and saw the plaintiff once or twice a year; that she first met Alvin Correll in November, 1938, at a time when Harry Gordon was present in such home; that on that occasion "Mrs. Gordon was administering the home when Mr. Correll said he didn't like it himself but he had put in \$250.00 of Mr. Correll's money and said she liked it so therefore he bought it for her."

Cliff Blankenship testified that he had known Alvin Correll for twenty five or thirty years, and for the last few years lived across the street from Alvin Correll; that in the spring of 1939 he had a conversation with Alvin Correll regarding the purchase of such property; that on such occasion Alvin Correll told him "that he didn't like to live down there and he had one only reason he bought this place was that he thought it might be good to him it would be a good place for his wife to make a living keeping roomers, being close to the school house."

The foregoing is all of the evidence tending to show that Alvin Correll advanced or advanced \$250.00 on any other sum of money to Alvin Correll for the purchase of such real estate or for any other purpose.

It is our opinion that the character was justified in finding that the plaintiff had not proved the allegations of her complaint as to such \$250.00, and in deciding that she was not entitled to any relief in that respect. Testimony of such character must be received with caution and must be carefully scrutinized, and is dangerous because it is liable to error, and such testimony, although uncontradicted, may be rejected if not clear and convincing. (See Koshkowsky v. Bagdon, 285 Ill. 385; 219

Laurence v. Laurence, 184 Ill. 367; Moreen v. Estate of Carlson, 365 Ill. 482; Kavanagh v. Wilson, 70 N.Y. 177; Quock Ting v. U. S., 140 U.S. 417.) To impress a trust upon property upon oral testimony it is essential that the facts be established by clear and convincing proof, and unless the proof is of that character the court is justified in denying relief. (See Ford v. Lighthall, 328 Ill. 107.) To establish ^a trust by parol evidence the proof must be so strong and unequivocal as to lead but to one conclusion, and in order to establish a trust, the evidence must be clear and satisfactory, not only as to its existence but as to its terms and conditions. (See Wies v. O'Horow, 337 Ill. 267; Cusack v. Cusack, 339 Ill. 108; Lurie v. Sabath, 208 Ill. 401.)

As to plaintiff's contention that Clarence Gorrell, as trustee, should be required to give a bond,- the will of the decedent did not require any bond and there is no evidence tending to show that Clarence Gorrell is not financially responsible or that he will in any way dissipate the trust fund. No evidence was offered on such subject.

We believe the trial court was justified in dismissing the amended complaint "without prejudice to a future suit to construe the will of Alva Gorrell in any respect that may be proper under the law." The estate of Alva Gorrell is still pending and undisposed of in the probate court. No showing has been made that Clarence Gorrell, as trustee, has received any moneys whatever from said estate, and no showing as to whether there will be sufficient money in said estate to pay said trust fund or any part thereof. So far as the record is concerned these questions are left to conjecture.

conjecture.

far as the record is concerned these questions are left to

in said estate to pay said trust fund or any part thereof. So

estate, and no showing as to whether there will be sufficient money

Gorelli, as trustee, has received any money whatever from said

of in the probate court. No showing has been made that Gorelli

the law." The estate of Alva Gorelli is still pending and undisposed

the will of Alva Gorelli in any respect that may be proven under

amended complaint "without prejudice to a future suit to construe

"to believe the trial court was justified in dismissing the

on such subject.

will in any way disprove the fact that. No witness was offered

that Gorelli herself is not financially responsible or that he

not require any bond and there is no evidence tending to show

should be required to give a bond, - the will of the deceased did

As to plaintiff's contention that Gorelli controls, as trustee,

Quack, 333 Ill. 108; Lutz v. Zebach, 308 Ill. 401.)

and conditions. (See Wise v. O'Heron, 337 Ill. 387, 309 Ill. 7.)

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338 Ill. 107.) To establish trust by parol evidence the proof

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U. S. 140 U.S. 414.) To impose a trust upon property upon oral

335 Ill. 433; Kavanagh v. Wilson, 70 N.Y. 177; 300 N.Y. 177.

Lawrence v. Lawrence, 134 Ill. 387; 130 N.Y. 177; 300 N.Y. 177.

Plaintiff contends that error was committed in that she was not permitted to testify over the objection of the defendants. She was an incompetent witness as to any facts occurring before the death of Alva Gorrell. (See Sec. 2 of the Evidence Act, Ch. 51, Rev. Stats.) The defense called and examined her as an adverse witness, over the objection of the plaintiff. At the conclusion of such examination her testimony was stricken on motion of her counsel and with the approval of counsel for defendants. Such testimony having been so stricken left the record in the same condition as though she had not testified at all.

Counter-claimants contend that the court erred in allowing them a judgment for only \$60.00 as rental. The trial court found that the counter-claimants should not recover rent from the plaintiff on account of her occupancy of the premises from December 18, 1939, "to the time that the first installment of rent became due said receiver, being the installment which was paid on April 6, 1942." As far as the record shows the counter-claimants did not make any claim for rent until such receiver was appointed. After the death of the testator and up to the time the receiver was appointed the plaintiff had been living in the premises apparently with the consent and approval of the counter-claimants, and apparently without any thought of the plaintiff being required to pay rent while this and other litigation was pending concerning her rights as an alleged widow and other alleged rights. Under these circumstances it is our opinion that the trial court, influenced by equitable considerations, did not err in entering judgment for only \$60.00 as rental.

Plaintiff contends that error was committed in that she was not permitted to testify over the objection of the defendants. She was an incompetent witness as to any facts occurring before the death of Alva Gorrell. (See Sec. 2 of the Evidence Act, Ch. 51, Rev. Stats.) The defense called and examined her as an adverse witness, over the objection of the plaintiff. At the conclusion of such examination her testimony was stricken on motion of her counsel and with the approval of counsel for defendants. Such testimony having been so stricken left the record in the same condition as though she had not testified at all.

Counter-claimants contend that the court erred in allowing them a judgment for only \$60.00 as rental. The trial court found that the counter-claimants should not recover rent from the plaintiff on account of her occupancy of the premises from December 18, 1939, "to the time that the first installment of rent became due said receiver, being the installment which was paid on April 6, 1942." As far as the record shows the counter-claimants did not make any claim for rent until such receiver was appointed. After the death of the testator and up to the time the receiver was appointed the plaintiff had been living in the premises apparently with the consent and approval of the counter-claimants, and apparently without any thought of the plaintiff being required to pay rent while this and other litigation was pending concerning her rights as an alleged widow and other alleged rights. Under these circumstances it is our opinion that the trial court, influenced by equitable considerations, did not err in entering judgment for only \$60.00 as rental.

Plaintiff contends that error was committed in that she was not permitted to testify even the objection to the defendant. She was an independent witness as to any facts occurring before the death of Alva Gervill. (See sec. 4 of the Evidence Act, Ch. 25, Rev. Stats.) The defense called and examined her as an adverse witness, over the objection of the plaintiff. At the conclusion of each examination her testimony was taken on motion of her counsel and with the approval of counsel for defendant. All testimony having been so taken and the record in the case completed as though she had not testified at all.

Counter-claimants contend that the court acted in allowing them a judgment for only \$50.00 as rental. The trial court found that the counter-claimants should not recover rent from the plaintiff on account of her occupancy of the premises from December 18, 1929, "to the time that the first installment of rent became due and received," being the installment which was paid on April 1, 1930. As far as the record shows the counter-claimants did not pay any claim for rent until such receiver was appointed. After the death of the testator and up to the time the receiver was appointed the plaintiff had been living in the premises apparently with the consent and approval of the counter-claimants, and apparently without any thought of the plaintiff being required to pay rent while this and other litigation was pending concerning her rights as an alleged widow and other alleged rights. Under these circumstances it is our opinion that the trial court, influenced by equitable considerations, did not err in entering judgment for only \$50.00 as rental.

Counter-claimants contend that the trial court erred in ordering that \$47.40 of the court costs be taxed against the counter-claimants. No reason is advanced and none is apparent why any costs should be taxed against the counter-claimants.

The decree of the trial court is affirmed in all respects, except as to such taxing of the costs ^{in the trial court} and as to such taxing of the costs such decree is reversed, and the cause is remanded with directions to order that all costs ^{in the trial court} be taxed against the plaintiff and counter-defendant.

Affirmed in part and reversed in part and remanded with directions.

Two local spots on

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

77402 12587 541 10

J. Polym. Sci. Part A: Polym. Chem. **37**, 1091-1106 (1999)

Abstract

STATE OF ILLINOIS

APPELLATE COURT

October
~~May~~ Term, A.D. 1944

324 I.A. 159

Sen
Term No. 9443

Agenda No. 10.

In the Matter of the Estate of)
Olive M. Campbell,)
Deceased.)

—)
Irving B. Campbell and Albert)
E. Robinson, Petitioners,)
Appellants,)

vs.)

Arthur W. Jones, individually)
and as Executor, Respondent,)
Appellee.)

Appeal from

Circuit Court

Edgar County

Dady, P. J.

Olive M. Campbell died on April 5, 1943. She left surviving her ~~bro~~ brother, Arthur W. Jones, otherwise known as A. W. Jones, as her only heir.

At the time of her death there were in existence and found amongst her papers four written instruments, each duly executed and attested by her. Each of three of such instruments dated respectively January 31, 1938, July 1, 1940, and March 21, 1942, purported to be her last will. The other instrument, dated July 10, 1941, was attached to and purported to be a codicil to the instrument dated January 31, 1938.

For convenience each of the first three instruments will be referred to as a will, and the last instrument will be referred to as a codicil.

Abstract

STATE OF ILLINOIS

DEPARTMENT OF REVENUE

October

1938

82-11139

1938

1938

In the matter of the estate of

Oliver J. Wagoner,

deceased.

Living J. Wagoner and others
vs.
J. Wagoner, Testator,
J. Wagoner, Executor.

vs.

Arthur J. Wagoner, Individually
and as Executor, Testator,
J. Wagoner.

1938

Oliver J. Wagoner, deceased, was born in 1871

and died in 1937. He was married to Mrs. J. Wagoner

and they had three children.

At the time of her death, Mrs. Wagoner was

living and was the widow of the deceased.

She was married to the deceased in 1891 and

they had three children, namely, Arthur J. Wagoner,

born in 1901, and two other children, born in 1903

and 1905. The other children, born in 1903

and 1905, were married to and supported by the deceased

the instrument dated January 31, 1938.

For convenience sake of the first three paragraphs will

be referred to as a will, and the last paragraph will be referred

to as a will.

The will dated January 31, 1938, so far as material, stated that she thereby revoked all former wills, directed her executor to pay her just debts, gave to Irving B. Campbell \$1,000.00, gave to Marguerite M. Robinson \$1,000.00, and in case of the latter's death before the death of the testator then gave said \$1,000.00 to Albert E. Robinson, and gave the rest and residue of her estate to A. W. Jones.

The codicil dated July 10, 1941, attached to the will dated January 31, 1938, so far as is material, stated that:

"First: in the Second Paragraph of my said Will wherein I give to Irving B. Campbell the sum of \$1000.00, the same is to be changed so that the said Irving B. Campbell shall have the sum of \$1500.00, and in case of the death of the said Irving B. Campbell prior to my death, the same is to go to his wife to be used by her in the education of their children.

Second: In all other respects, I hereby affirm and ratify my original Will."

The will dated July 1, 1940, so far as is material, stated that she thereby revoked all former wills, and that:

"First: I give * * * to Irving B. Campbell the sum of \$5,000.00 * * *.

Second: I give * * * the sum of \$500.00 to Albert E. Robinson.

Third: I give, devise and bequeath all the rest * * * of my estate * * * of whatsoever kind or nature * * * or in which I shall have any interest whatever at the time of my death, to my brother, Arthur W. Jones.

Fourth: I intend by this Will to include as a part of my gross estate and to dispose of the same in accordance with the foregoing three sections, the entire trust estate, both principal and income, created by that certain trust agreement identified as Chicago Title and Trust Company, Trust No. 24988, dated April 30, 1930, by and between Olive M. Campbell, Irving B. Campbell, and A. W. Jones and Chicago Title and Trust Company, a corporation, as Trustee, pursuant to the provisions of said trust agreement."

The first thing I noticed when I stepped out of the car was the cold. It was a sharp contrast to the warm blanket I had been sitting under. I looked up at the sky, which was a pale, hazy blue. The air smelled clean, almost sterile. I took a deep breath, feeling the cold air fill my lungs. I was alone in the vast, open space, and it felt like I had been dropped into a new world. The silence was deafening, and I could hear the faint hum of the car's engine as it started to move. I felt a sense of freedom, but also a sense of isolation. I was on my own, and I had to figure out what to do next.

The second thing I noticed was the sound. It was a low, steady hum that seemed to come from everywhere and nowhere at once. I looked around, but I couldn't see anything. The air was so still that I could hear the sound of my own heartbeat. I felt like I was in a dream, or maybe I was. The sound was so familiar, yet so strange. It was like I had heard it a thousand times before, but I couldn't place it. I tried to focus on it, but my mind kept wandering. I was lost, and I didn't know how to get back. The sound was the only thing that kept me grounded, and I clung to it like a lifeline. I didn't know where it was coming from, but I knew it was there. It was a part of me, and I couldn't let it go.

The third thing I noticed was the light. It was a soft, golden light that seemed to come from the horizon. I looked up, but I couldn't see anything. The light was so warm, so comforting. It was like a fire in the sky, and I felt like I was being held in its embrace. I didn't know where it was coming from, but I knew it was there. It was a part of me, and I couldn't let it go. The light was the only thing that kept me from losing myself in the darkness. I felt like I was being led, and I followed the light wherever it went. I didn't know where it was taking me, but I knew it was leading me home. The light was the only thing that made sense, and I clung to it like a lifeline. I didn't know where it was coming from, but I knew it was there. It was a part of me, and I couldn't let it go.

So far as material, the will dated March 21, 1942, declared the same to be her "last will," directed her executor to pay her debts and funeral expenses, and stated that:

"After the payment of such expenses and debts, I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, of whatsoever kind and nature, and wheresoever situate of which I may die seized or possessed at the time of my death, to my beloved brother, A. W. Jones, as and for his own property absolutely forever and in fee simple."

On April 8, 1943, on the petition of A. W. Jones, the will dated March 21, 1942, was admitted to probate as the decedent's last will.

On April 26, 1943, Irving B. Campbell, who is one of the appellants, filed in the probate court a petition, alleging therein that decedent left the will dated July 1, 1940, and also left the will dated March 21, 1942. The petition stated that the will dated March 21, 1942, did not revoke the will dated July 1, 1940, and was only partially inconsistent therewith, and that the will of the decedent is to be found by reading and construing both said instruments together, and that both should be admitted to probate. Said petition prayed that the order entered April 8, 1943, admitting the will dated March 21, 1942, be vacated, that the will dated July 1, 1940, be admitted to probate and that petitioner have further relief.

On May 19, 1943, the county court, acting in probate, after a hearing, denied such petition. Irving B. Campbell perfected an appeal from such last order to the circuit court. On appeal and after a hearing on the merits the circuit court entered an order denying and dismissing such petition. Irving B. Campbell and Albert E. Robinson have perfected this appeal from such order of the circuit court.

THE UNIVERSITY OF CHICAGO
DIVISION OF THE PHYSICAL SCIENCES
DEPARTMENT OF CHEMISTRY

RECEIVED
JAN 10 1964
FROM
DR. J. H. GOLDSTEIN
100 EAST 58TH STREET
NEW YORK 22, N.Y.

TO
DR. J. H. GOLDSTEIN
100 EAST 58TH STREET
NEW YORK 22, N.Y.

RE: [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

The Trust Agreement referred to in the will dated July 1, 1940, was executed on April 30, 1930, by the testatrix, and by Irving B. Campbell and A. W. Jones, the three of them being referred to in the agreement as the donors and the trust company as trustee. Such agreement recited that the donors had assigned and delivered to the trustee certain personal property, that the trustee should pay to Olive M. Campbell, out of the income or principal, \$100.00 per month, and larger sums which Irving B. Campbell or Arthur W. Jones might authorize, and that during the joint lives of the donors they should have the right to revoke, alter or amend the agreement.

The only other provision of the Trust Agreement pertinent to the issues here involved was:

"Upon the death of Olive M. Campbell, the Trustee shall transfer, pay over and deliver the trust estate then in its possession to her testamentary appointees, and in lack of such appointment, to the persons who shall then be her heirs at law according to the statute of descent of Illinois then in force."

It was stipulated that all the property and assets which were placed in the possession of the trust company under such trust agreement were originally the property of Olive M. Campbell, and that neither Irving B. Campbell nor A. W. Jones contributed anything to the assets of the trust.

The evidence shows that the estate was inventoried at about \$5000.00 in the county court, and that the trust estate consists of bonds of \$8800.00 par value, twenty-five shares of preferred stock, some worthless securities, and a deficit of \$359.51 in the cash accounts.

The Trust Agreement referred to in the will dated July 1, 1940, was executed on April 30, 1939, by the testatrix, and by Irving B. Campbell and A. W. Jones, the three of them being referred to in the agreement as the donors and the trust company as trustee. Such agreement recited that the donors had assigned and delivered to the trustee certain personal property, and the trustee was to pay to Olive W. Campbell, out of the income on the property, \$100.00 per month, and further sums which Irving B. Campbell or William B. Jones might authorize, and that during the term of the agreement the donors they should have the right to revoke, alter or amend the agreement.

The only other provision of the Trust Agreement pertinent to the issues here involved was:

"Upon the death of Olive W. Campbell, the Trustee shall terminate, pay over and deliver to her estate then in her possession or her estate, and in full of such claims and to the persons who at all times have been or may be according to the estate of record of Illinois then in force."

It was stipulated that all the property and assets which were placed in the possession of the trust company under such Trust Agreement were originally the property of Olive W. Campbell, and that neither Irving B. Campbell nor A. W. Jones contributed anything to the assets of the trust.

The evidence shows that the estate was inventoried at about \$5000.00 in the county court, and that the trust estate consists of bonds of \$4000.00 per value, twenty-five shares of preferred stock, some worthless securities, and a deficit of \$233.81 in the cash accounts.

Appellants contend that the will dated March 21, 1942, did not exercise the power of appointment under the Trust Agreement and therefore is not inconsistent with the will dated July 1, 1940; that the will dated March 21, 1942, merely disposes of estate of which testatrix^x "may die seized or possessed at the time of her death;" that the trust property was not part of her "estate" or in her possession; that the will dated March 21, 1942, can be given full effect as a disposition of testatrix' "estate" and in her "possession" at the time of her death, and leave the will dated July 1, 1940, in effect as a disposition of the trust property.

We do not consider it necessary to discuss the question of whether the codicil dated July 10, 1941, and the will dated January 31, 1938, were properly admissible in evidence for the purpose of determining the intent of the testatrix.

Section 46 of the Probate Act, (Chap. 3, Sec. 197, Ill. Bar Stats.) so far as is material, provides that, "A will may be revoked only (a) * * * (b) by some other will declaring the revocation, (c) by a later will to the extent that it is inconsistent with the prior will, or * * *."

In *Lasier v. Wright*, 304 Ill. 130, 150, the court said: "When a testator makes a will absolutely inconsistent with all other wills and declares it ~~his~~ his last will and testament, such act of necessity amounts to a declaration that all former wills are revoked. The word, 'declare,' as defined by the lexicographer, means primarily to make known; to make manifest; to make clear; to present in such ^a manner as to exemplify; to disclose; to reveal. The testator in this case, within the meaning of the statute, has declared a revocation of his former will by

impliedly saying in every clause thereof that the will he was then executing was his will and his complete and only will. It was not necessary to use express words in terms declaring such revocation. The statute makes no such requirement."

Appellants concede that the will dated March 21, 1942, revoked all previous wills in so far as they were inconsistent therewith, but contend that the "fourth" paragraph of the will dated July 1, 1940, was not revoked. Such paragraph made no specific bequest to either of the appellants. All that either appellant was given by the will dated July 1, 1940, was a general bequest. By the will dated July 1, 1940, Irving E. Campbell was given \$5,000, and Albert E. Robinson was given \$500, while the will dated March 21, 1942, gave the entire estate of testatrix, of every kind and nature, to her brother A. W. Jones.

It is our opinion that the provisions of the will dated July 1, 1940, and of the will dated March 21, 1942, are so inconsistent as to make the will dated March 21, 1942, the sole last will and testament of the testatrix without any qualification whatever, and it is our opinion that the will dated July 1, 1940, was properly denied admission to probate.

The judgment of the trial court is affirmed.

Affirmed.

Abstract

General Number 9420.

Agenda Number 2.

IN THE APPELLATE COURT
THIRD DISTRICT
OF ILLINOIS
OCTOBER TERM, A. D. 1944

BERTHA GALE, DAN B. MARKEL,
and JOHN MARKEL,

Plaintiffs-Appellants

-vs-

ETHEL HECKMAN ROBERTS,

Defendant-Appellee.

APPEAL FROM THE CIRCUIT COURT
OF PIATT COUNTY.

322 I.A. 159²

~~HONORABLE WILLIAM S. BODMAN,~~

~~Judge Presiding.~~

HAYES, J.:

Cova McCollister died intestate on February 26, 1940, a resident of Piatt County, Illinois, leaving her surviving, her husband James W. McCollister, and Bertha Gale, Dan B. Markel and John Markel, her niece and nephews. Her estate consisted entirely of personal property. On July 28, 1939, Mrs. McCollister prepared the following written statement:

*July 28-1939

"What I have left to be given to Dan. Jno. & Bertha
I want it divided even-each a 1/3

Cova McC

"New watch-Bertha
Old " Eileen
Relic Brest pin-Ardyth."

After the death of his wife, McCollister told Bertha Gale that her Aunt had left her property for him to divide among her nieces and nephews, showing her the above quoted statement which was kept in a box of papers in the McCollister home. Subsequently McCollister gave Bertha Gale

Insert:

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two hundred dollars, and told her that the written statement had no legal effect and did not propose to divide the estate. McCollister died September 23, 1941.

On September 30, 1941, Bertha Gale filed her complaint in the Circuit Court of Piatt County against Ethel Heckman Roberts, McCollister's daughter by another marriage. This complaint was later amended and the first count thereof was stricken on motion of defendant on March 2, 1943. A similar motion to dismiss the second count was taken under advisement. Bertha Gale, who in the meantime had been joined by her brothers Dan B. Markel and John Markel as plaintiffs, sought to amend the second count but on May 11, 1943 the Court sustained defendant's objections to the amendment and dismissed the second count because it failed to state a cause of action. Plaintiffs have appealed from this order of the Circuit Court.

At the outset, it should be noted that the first count of plaintiff's complaint was dismissed on March 2, 1943 and ~~that order was never appealed; we are therefore concerned~~ *no complaint is made of that order* with the sufficiency of only the second count. That count sought to impose a trust upon all property received by McCollister from his wife and now in the hands of his daughter. Assuming, as we must, the truth of plaintiffs' allegations, which we do not recite in full, it may be that a constructive trust ~~could~~ ^{might} be imposed here upon the property formerly belonging to Cove McCollister, now in the hands of defendant, but there is no allegation that such property is now in defendant's hands. It is true that plaintiffs allege that McCollister retained possession of his wife's property after her death; that he subsequently died, and by implication it appears that defendant was his only heir at law and next of kin. It nowhere

Two hundred and fifty dollars was paid for the purchase of the land on the 1st day of January 1880.

The land was purchased from the United States Government for the purpose of establishing a school for the children of the Indians.

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appears however whether McCollister died testate or intestate, or even that all or any part of his wife's property was in McCollister's possession at the time of his death. Thus plaintiffs have failed to allege that their aunt's property can be traced into defendant's hands. This, of course, is essential under the recognized practice of equity. *Moore vs. Taylor*, 251 Ill. 46⁸; *Hauk vs. vanEngen*, 196 Ill. 20. While there is an allegation that McCollister conveyed certain real estate to his daughter, subsequent to his wife's death, this of course, is of no importance, without an allegation that he converted his wife's personal property to purchase said real estate. No such allegation appears.

We do not believe that there were sufficient allegations in the second count of the complaint to entitle the plaintiffs to prevail in equity. What the plaintiffs' rights at law are we have not considered, nor have we passed on them. The Circuit Court of Piatt County properly dismissed the second count of the complaint and its judgment is therefore affirmed.

JUDGMENT AFFIRMED.

General Number 9432.

Agenda Number 3.

IN THE APPELLATE COURT
THIRD DISTRICT
OF ILLINOIS

OCTOBER TERM, A. D. 1944.

32-1.A.160

| | | |
|-----------------------|---|---------------------------------------|
| MONTE L. GOAD, | : | APPEAL FROM THE CIRCUIT COURT |
| Defendant-Appellant, | : | OF EDGAR COUNTY. |
| -vs- | : | |
| THELMA STONER PHIPPS, | : | HONORABLE BEN F. ANDERSON, |
| Plaintiff-Appellee. | : | Judge Presiding. |

HAYES, J.:

On the morning of December 15, 1941, the plaintiff-Appellee Thelma Phipps, who was a school teacher, in company with another school teacher, were traveling in a northerly direction on state route 49. The plaintiff was driving a Ford Coupe. At the intersection of routes 49 and 133, her car collided with that of the defendant, Monte L. Goad, who was driving a Studebaker automobile. The plaintiff was on her way to her school, and had a small child riding with her. The accident occurred at about eight-thirty o'clock A. M. About three hundred feet south of the intersection, there is a "slow" sign located on the east side of route 49. The defendant was driving east on route 133 and just west of the intersection on route 133 there is a "stop" sign. The defendant claimed, in his testimony, that he stopped before entering the intersection and proceeded across the same slowly. He is contradicted in this by the plaintiff and

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1. *Journal of the American Medical Association*, 1997; 277: 103-107.

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the school-teacher passenger who testified that they saw him approach the intersection and slow down a little before running the stop sign. Defendant admitted in his evidence that he did not see plaintiff's car until just at the time of the collision. The jury found the issues in favor of the plaintiff and assessed her damages at \$1175.00.

After a motion in arrest of judgment and a new trial was overruled, judgment was entered on the verdict from which this appeal is taken. The principal ground relied upon by the defendant for reversal herein, is instruction number 4, which in effect states that for the plaintiff to be guilty of contributory negligence so as to bar recovery she must have failed to exercise such care and foresight as an ordinary prudent man possessing ordinary intelligence would exercise under the circumstances similar to those surrounding the plaintiff at the time of the alleged injury. It further stated that: "If you believe from the evidence that the plaintiff in entering the intersection in question, exercised that care and foresight to avoid danger that a person of ordinary prudence, caution and intelligence usually exercised under the same circumstances," then it directs that they should find the plaintiff not guilty of contributory negligence. The point complained of is that the instruction limits the conduct of the plaintiff to the time of the accident, and in entering the intersection but does not cover her approaching the intersection. It appears that plaintiff's instruction number 2 stated that plaintiff "was required to exercise ordinary care for her own safety, before and at the time of the accident." The Court, in addition, gave an instruction telling the jury to treat the instructions as one series. It seems to us that the limitation put on the language in instruction number 4 is

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too narrow, and that a reasonable construction of the words, "in entering the intersection" should be treated as to include approaching the intersection. If any error was made in the giving of instruction number 4, it is corrected by the language used in instruction number 2. It definitely says before and at the time of the accident, and this particularly in view of the fact that the court took the precaution of giving an instruction advising the jury to consider them as a series. We find no reversible error in the giving of this instruction.

Complaint is made on the action of the Trial Court in allowing plaintiff to re-open her case after it had been closed. The motion set forth that the plaintiff had been instructed by her counsel not to mention an insurance company, and as a result of this instruction she testified that she received a check for one hundred dollars from Mr. McArthur and a credit for three hundred dollars on a new car, leaving it to appear that the value of the wrecked car was four hundred dollars. After the Court allowed the motion for the purpose of straightening out plaintiff's answer in this regard, she testified she got one hundred dollars for the wrecked automobile, and that three hundred dollars was allowed from her own insurance company. We find that the Court properly exercised its discretion in opening the evidence and permitting the truth to be shown, and that the reply of the plaintiff in stating that she had received three hundred dollars in insurance from her own automobile could not possibly have prejudiced the defendant, as nothing was said or developed in the presence of the jury that the defendant had insurance.

The defendant contends that the verdict and judgment is against the weight of the evidence but upon an examination

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of the record on all disputed issues, it appears that there is ample evidence in the record to support the verdict and judgment. We cannot find, as a matter of law, that the verdict is against the manifest evidence.

The only remaining question pressed on this appeal is that the verdict is excessive. The plaintiff's proofs tend to show that the damage to appellee's car was four hundred dollars; the doctor bills were seventy-five dollars, and her loss from missing school and hiring a substitute was one hundred and thirty-five dollars. There was personal injury shown, as well as incapacity for a period of time, so we cannot find that the verdict is so grossly excessive as to warrant a reversal, nor do we find that the Court committed any reversible error in permitting the rebuttal testimony complained of.

For the reasons set forth the judgment of the Circuit Court of Edgar County is affirmed.

JUDGMENT AFFIRMED.

THE SECRETARY OF THE ARMY
WASHINGTON, D. C.
JANUARY 1, 1900

SIR:
I have the honor to acknowledge the receipt of your letter of the 28th inst. in relation to the matter of the purchase of land for the establishment of a military reservation at the mouth of the River of the North, in the State of North Carolina. The matter is being considered by the War Department, and I am sorry to say that I am unable to give you a definite answer at this time. I will, however, endeavor to expedite the matter as far as possible, and will keep you advised of any further developments.

I am, Sir, very respectfully,
Your obedient servant,
J. H. COOPER,
Secretary of the Army.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

Gen. No. 9444

October

May Term A.D. 1944

Agenda No. 11

VICTORIA DARMER,

Plaintiff-Appellant

v.

JOHN E. DARMER,

Defendant-Appellee

Appeal from
Circuit Court
Sangamon County.

324 I.A. 160²

RIESS, J.:

Plaintiff-Appellant, Victoria Darmer, has appealed from a decretal order of the Circuit Court of Sangamon County entered on March 11, 1944, reducing from the sum of \$105 per month to \$50 per month the amount of alimony payable to her by the Defendant-Appellee, John E. Darmer, under the terms of a prior decree for divorce and alimony entered on September 28, 1940. Concerning the custody of an eighteen year old son, the original decree provided "that the plaintiff have the care and custody of the said child, Robert C. Darmer until the further order of this Court." It was further "Ordered, Adjudged and Decreed that the defendant pay to the plaintiff the sum of \$105 a month, payable in two equal monthly payments of fifty-two and Fifty One-Hundredths Dollars (\$52.50) on the first and fifteenth days of each month hereafter until the death or remarriage of the defendant or until the further order of this Court."

On April 24, 1942, the defendant filed his first verified petition alleging that there had been a material change in the status of the parties since the approval of the original decree; that petitioner was a dentist and was making from \$200 to \$225 a month at the time the decree was entered but was now averaging about \$175 a month and that the son, then aged eighteen years, "is now aged twenty years, is married and living and employed in the State of California, making \$40 to \$50 a week from his employment" and further alleges "that the mother of plaintiff is well-to-do, worth in the sum of about fifty thousand

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

Gen. No. 2444

October
Term A.D. 1944

Agenda No. 11

VICTORIA CARMER,

Plaintiff-Appellant

v.

JOHN E. CARMER,

Defendant-Appellee

Appeal from
Circuit Court
Madison County.

FILED, 11.

Plaintiff-Appellant, Victoria Carmer, was appointed from a
 general order of the Illinois Court of Appellate County entered on
 March 11, 1944, returning from the sum of \$100 per month to \$150
 per month the amount of alimony payable to her by the Defendant-Appellee,
 John E. Carmer, under the terms of a prior decree for divorce and alim-
 ony entered on September 28, 1940. Concerning the decree of alim-
 ony entered on September 28, 1940, the original decree provided "that the plain-
 tiff have the care and custody of the said child, Robert E. Carmer,
 until the further order of this Court." It was further "Ordered,
 Adjudged and decreed that the defendant pay to the plaintiff the sum
 of \$100 a month, payable in two equal monthly payments of fifty-two
 and fifty one-hundredths Dollars (\$52.50) on the first and fifteenth
 days of each month hereafter until the death or remarriage of the
 defendant or until the further order of this Court."

On April 24, 1943, the defendant filed his first verified
 petition alleging that there had been a material change in the status
 of the parties since the approval of the original decree; that petitioner
 was a dentist and was making from \$900 to \$1200 a month at the time
 the decree was entered and was now averaging about \$150 a month and
 that the son, then aged eighteen years, "is now aged twenty years,
 is married and living and employed in the State of California, making
 \$40 to \$50 a week from his employment," and further alleged "that the
 mother of plaintiff is well-to-do, worth in the sum of about fifty thousand

dollars and the payment of alimony is not necessary for her support and maintenance." An order discontinuing or reducing the amount of such payment was prayed for by the defendant. The plaintiff filed an answer, denying that there had been any material change in the income of defendant since the original decree was entered; denying that she had any other source of income than the allowance of \$105 per month provided for in the decree and admitting that the minor son had since married and was no longer supported by her. A hearing was had upon the petition and answer thereto and an order was entered by the Court denying the petition, from which order no appeal was taken.

The second petition was filed on January 31, 1944. It again set forth in substance the same allegations as the previous petition which had been denied by the Court; alleged that there had been a material change in the status of the parties and that since the approval of the original decree, the petitioner had developed inflammatory rheumatism and has a net income of approximately \$200 a month; that because of the state of his health he is unable to constantly practice his profession of dentistry and that the plaintiff resides with her mother who is a very well-to-do person. Defendant again prayed for a discontinuance of or reduction in the amount of the allowance. An answer was filed by the appellant admitting that the child had reached his legal majority but denying that the amount of alimony provided for in the original decree was dependent upon the fact that the child was then a minor residing with plaintiff and was and had been self-supporting, averring that he had been self-supporting since November 15, 1941, and that these facts were pleaded and presented to the Court by the former petition which was denied on June 9, 1942; that there had been no material change since that time in the defendant's health which affected his income and further alleging that in 1943, the plaintiff had been obliged to pay \$102 income tax from her allowance; that she had no property or income or means of support aside from said allowance of \$105; that her cost of living and necessary expenses had increased and that no legal

cost of living and necessary expenses had increased and that no legal income or means of support aside from said allowance of \$105; that her pay \$108 income tax from her allowance; that she had no property or and further alleging that in 1945, the plaintiff had been obliged to since that time in the defendant's health which affected his income was denied on June 9, 1946; that there had been no material change were pleaded and presented to the court by the former petition which been self-supporting since November 15, 1941, and that these facts plaintiff and was and had been self-supporting, averring that he had dependent upon the fact that the child was then a minor residing with that the amount of alimony provided for in the original decree was mistaking that the child had reached his legal majority but denying amount of the allowance. An answer was filed by the appellant on defendant again prayed for a discontinuance of or reduction in the \$117 resides with her mother who is a very well-to-do person. He constantly practice his profession of dentistry and that the plaintiff a month; that because of the state of his health he is unable to Plaintiff's condition and has a net income of approximately \$205 approval of the original decree, the petitioner had developed in material change in the status of the parties and that since the which had been denied by the court; alleged that there had been a set forth in substance the same allegations as the previous petition The second petition was filed on January 31, 1944. It again appeal was taken.

was entered by the court denying the petition, from which order no hearing was had upon the petition and answer thereto and an order minor son had since married and was no longer supported by her. A of \$105 per month provided for in the decree and admitting that she denying that she had any other source of income than the allowance in the income of defendant since the original decree was entered; filed an answer, denying that there had been any material change of such payment was prayed for by the defendant. The plaintiff and maintenance." An order discontinuing or reducing the amount dollars and the payment of alimony is not necessary for her support

obligation rests upon her mother for her support. Upon issues joined and hearing of testimony, an order was entered on March 11, 1944, reducing plaintiff-appellant's alimony allowance to \$50 per month. This appeal then followed.

The evidence consisted of testimony on direct and cross examination of the petitioning defendant and of his witness, Doctor Heisler, whose office was located in an adjoining suite on the same floor as that of the defendant. The testimony of the plaintiff supported the averments of her answer and opposed the reduction of the amount allowed to her in the original decree.

From the evidence, it appears that the petitioning defendant was a dentist who practices his profession in the City of Springfield; that the defendant stated on cross examination concerning his 1943 income that "I think my net income for the year was between Twenty-Seven and Twenty-Eight Hundred Dollars, am not positive about that, don't have a copy with me. For the year 1940 all I can say is that it has run between Twenty-Five Hundred and Twenty-Nine Hundred or Three Thousand for the last two or three years. I keep my own books." He further stated that Doctor Heisler's office was located on the same floor for the past two or three years; that he, the defendant, had rheumatic trouble in 1935 and 1936; was able to come down here every week and leave alimony check with the Clerk of the Court; that it was not a matter of walking but of pain in standing there; that in his general practice he is engaged more than 60% of his time; that at times, his foot and knee swells but was never in a hospital and that at times he rests on a couch; that his business has increased very little, if any, within the last year or two because of a lot of the dentists leaving here.

Doctor Heisler testified that the defendant suffered from "rather chronic rheumatism-what we call excess hypodynia-acute attacks might appear and make him physically unable for periods of time." That defendant lives in the rear of his office which witness did not deem a fit place to live; that he had to "help out and care a little

obligation rests upon her mother for her support. Upon January 11, 1944, following plaintiff's attorney's motion for summary judgment, an order was entered on March 11, 1944, reducing plaintiff's attorney's allowance to \$50 per month. This appeal then followed.

The evidence consisted of testimony on direct and cross examination of the petitioning defendant and of his witness, Doctor Helmer, whose office was located in an adjoining suite on the same floor as that of the defendant. The testimony of the plaintiff supported the averments of her answer and opposed the reduction of the amount allowed to her in the original decree.

From the evidence, it appears that the petitioning defendant was a dentist who practiced his profession in the City of Springfield; that the defendant stated on cross examination concerning his income that "I think my net income for the year was between twenty-seven and twenty-eight hundred dollars, my net positive about that. Don't have a copy with me. For the year 1940 and I can say it that it was between twenty-five hundred and twenty-eight hundred or three thousand for the last two or three years. I keep my own books." He further stated that Doctor Helmer's office was located on the same floor for the past two or three years; that he, the defendant, had rheumatic trouble in 1935 and 1936; was able to come down here every week and leave himself check with the clerk of the Court; that it was not a matter of walking out of pain in climbing stairs; that in his general practice he is engaged more than 80% of his time; that at times, his foot and knee aches but was never in a hospital and that at times he rests on a couch; that his business has increased very little, if any, within the last year or two because of a lot of the dentists leaving here.

Doctor Helmer testified that the defendant suffered from "rather chronic rheumatism-what we call excess hypothyroidism attacks" and that he was physically unable for periods of time. That defendant lives in the town of his office which witness did not deem a fit place to live; that he had to "help out and save a little

for himⁿ; that at times he had been unable to come down the street and witness went down and brought him milk and bread because he couldn't walk down; that he has known defendant to turn away patients because he didn't feel well enough to care for them; that it was a hardship to continue in his present living conditions, especially where he has to be on his feet all the time.

Plaintiff testified that she lives in the same premises which she had occupied when divorced and during all of that time paid \$30 rent per month and still pays \$30 per month rent; that her living expenses increased and are somewhat higher; that she pays more for coal than before and living has gone up; that she has no property and no other income of any kind; is aged fifty-five years and was married twenty-seven years to the defendant before the divorce; that she might also be under a physician's care but could not afford it; that during the first eighteen months after her divorce she paid no income tax but was obliged to pay the tax for the year of 1942 and also paid \$102 for the year 1943; that her husband had been troubled with rheumatism at times before the divorce was granted to her and would occasionally lose a day or two from his work on that account; that her mother was with her temporarily and is soon to leave; that she had been with her since July, owns property in Springfield, but not the property in which plaintiff resides, which was owned by a Mr. Stoleis; that she had one son in the army and the other one in California, who is an accountant; that both of her sons are married; that she receives nothing from either of them; that her mother lives at Fort Lauderdale, Florida, but had a fire in her building here and she has come here to look after it until it is taken care of; that her father is deceased and her mother is a widow; is not wealthy but owns a building on North Sixth Street from which she has received no income since the fire last March; that the building was an apartment building at 321 and 323 North Sixth Street; that mother does not contribute to her support. The facts concerning her mother's property holdings were developed by questions by the Chancellor.

From an examination of the record, it appears that the allegations of the petition, answer and proofs concerning the net income

For him; that at times he had been unable to come down the stairs
and witness some down and brought him back and heard because he couldn't
walk down; that he has known defendant to turn away and leave because
he didn't feel well enough to come for him; that he is in a partnership
to continue in his present living conditions, especially there as he
to be on his feet all the time.

Plaintiff testified that she was in the city of New York
and had received a new divorce and during all of that time she had
been married and still kept \$50 per month; that she was living in a house
increased and she received a letter; that she was in New York City
before and living has gone up; that she was in New York City and her
income of all kind; as when fifty-five years old was married twenty-
seven years to the defendant before the divorce; that she was also
be under a physician's care but could not afford it; that during the
first eighteen months after her divorce she was in a house but was
obliged to pay the rent for the year of 1942 and also \$100 for the
year 1943; that her husband had been married with defendant at some
before the divorce was granted to her and would occasionally come
day or two from his work on that account; that she worked for him for
temporarily and he soon as he was; that she was not able to work
fully, some property in California, but she was married in New York
with realties, which was owned by a Mr. [redacted]; that she was one of
in the city and the other one in California; and in an [redacted] test
both of her sons are married; that she receives nothing from either of
them; that her mother lives at [redacted] [redacted] and a
live in her building here and she has come home to look after it until
it is taken care of; that her husband is deceased and her mother is a
widow; is not wealthy but owns a building on North Sixth Street from
which she has received no income since the time last [redacted]; that the
building was an apartment building at 501 and 503 North Sixth Street;
that mother does not contribute to her support. The facts concerning
her mother's property holdings were developed by questions by the
Opponent.

From an examination of the record, it appears that the allega-

tion of the petition, answer and proofs concerning the net income

and living conditions and expenses of the parties were substantially the same upon both hearings and that no reduction in the net income of the defendant has occurred; that aside from defendant's advancing age and some testimony of greater inconvenience caused by "chronic rheumatism", no material or substantial change in the physical or financial condition, income or earning power of the defendant is shown; that the plaintiff's expenses in the way of rents and necessary cost of living have not decreased since 1940 when the original decree was entered nor since 1943 when the first petition to modify the decree was heard and denied by the Court. Prior to the hearing on the former petition, the son had left his home, married and moved to California and that fact, together with the physical condition and income of the defendant, as the Court then viewed the facts, had showed no substantial change justifying a reduction and the petition was denied. Certainly, the present petition, when read with the former petition and answers are remarkably similar in language and in substance and did not upon the hearing herein, show any substantial change or reduction in the income or continued earning ability of the defendant, either since the original decree was granted or since the former petition was denied.

If a material change is shown, the Chancellor may, in the exercise of discretionary powers, change or alter the amount of the alimony allowance in such manner as shall appear reasonable and proper. If no material change is so shown, the Chancellor is without power to modify the original decree, which, in the instant case, provided that the petitioner pay to the plaintiff the sum of \$105 per month. It is pointed out that at the time of the original decree, the eighteen year old son was living with the plaintiff and that he has since left the state and married. That was true and was duly alleged and admitted by the parties at the time that the former petition was heard and denied by the Court on June 9, 1942. It also appears from the evidence that the cost of living of the plaintiff has increased and that she is now obliged to pay the approximate amount of one month's allowance as income tax; that the plaintiff's mother owns certain

and living conditions and expenses of the parties were substantially
the same upon both hearings and that no reduction in the net income
of the defendant has occurred; that aside from defendant's earnings
and some testimony of greater income received by "certain
persons", no material or substantial change in the physical or
financial condition, income or earning power of the defendant is shown;
that the plaintiff's expenses in the way of rent and necessary cost
of living have not decreased since 1940 when the original decree was
entered nor since 1945 when the first petition to modify the decree
was heard and denied by the court. Prior to the coming on the former
petition, the son had left his home, married and moved to California
and that fact, together with the physical condition and income of
the defendant, as the court then viewed the facts, had shown that
substantial change justifying a reduction and the petition was denied.
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was heard and denied by the court on June 9, 1945. It also appears
from the evidence that the cost of living of the plaintiff has increased
and that she is now obliged to pay the approximate amount of one
month's allowance as income tax; that the plaintiff's mother owns certain

real estate and that the plaintiff is one of several children toward whose support the mother might have been able to make voluntary contributions but she is not shown to have so contributed and her financial status is therefore not now material to the issues herein. The plaintiff's testimony that she received no income whatever aside from that which is paid to her as alimony under the former decree of the Court is not refuted by any testimony in the record. It has been frequently held by the Courts of Review of this State that a divorce decree is conclusive of the correctness of the amount of alimony awarded under conditions existing at the time the decree is entered and can only be modified by the Chancellor upon proper showing of material changes in the status of the parties. It has also been held that the burden of proof is upon the divorced husband seeking a reduction, to petition for the reduction of alimony payments and to prove by a preponderance of the evidence that there was a material change in the parties income and living conditions since entry of the decree. *Molt v. Molt*, 320 Ill. App. 133, 49 N.E. (2d) 860; *White v. White*, 312 Ill. App. 583, 38 N. E. (2d) 525; *Pribyl v. Pribyl*, 250 Ill. App. 349; *Wiseman v. Wiseman*, 290 Ill. App. 535, 8 N. E. (2d) 960; *Smith v. Smith*, 334 Ill. 370, 382, 166 N. E. 85. It has also been held by the First Division of this Court in the recent case of *Hoover v. Hoover*, 307 Ill. App. 590, 603, 30 N. E. (2d) 940, that although the decree awards custody of a minor child to the mother, if the decree makes no provisions for payment of any sum for support of the child, it is not grounds for reduction of such provision that the child had come of age. The existing facts and circumstances and provisions of the decree in each case shall prevail. In the instant case, it will be noted that the specific language of the original decree making the allowance reads as follows: "That the defendant pay to the plaintiff the sum of One Hundred Five Dollars (\$105.00) a month, payable in two equal monthly payments of fifty-two and Fifty One-Hundredths Dollars (\$52.50) on the first and fifteenth days of each month hereafter until the death or remarriage of the defendant or until the further order of this Court." No reference

real estate and that the plaintiff is one of several children toward whom support the mother might have been able to make voluntarily contributions but she is not shown to have so contributed and her financial status is therefore not now material to the instant matter. The plaintiff's testimony that she received no income whatever aside from that which is paid to her as alimony under the former decree of the Court is not refuted by any testimony in the record. It has been repeatedly held by the Courts of Review of this State that a divorce decree is conclusive of the correctness of the amount of alimony awarded under conditions existing at the time the decree is entered and can only be modified by the Chancellor upon proven showing of material changes in the status of the parties. It has also been held that the burden of proof is upon the divorced husband seeking a reduction, to petition for the reduction of alimony payments and to prove by a preponderance of the evidence that there was a material change in the parties' income and living conditions since entry of the decree. *Walt v. Walt*, 280 Ill. App. 122, 48 N.E. (2d) 860; *White v. White*, 278 Ill. App. 383, 43 N.E. (2d) 883; *Tracy v. Tracy*, 250 Ill. App. 240; *Wideman v. Wideman*, 250 Ill. App. 255, 8 N.E. (2d) 900; *Smith v. Smith*, 234 Ill. 370, 288, 168 N.E. 85. It has also been held by the First Division of this Court in the recent case of *Heover v. Heover*, 207 Ill. App. 530, 301, 30 N.E. (2d) 940, that although the decree awards custody of a minor child to the mother, if the decree makes no provision for payment of any sum for support of the child, it is not grounds for vacation of such provision that the child had come of age. The existing facts and circumstances and provisions of the decree in each case shall prevail. In the instant case, it will be noted that the specific language of the original decree making the allowance reads as follows: "That the defendant pay to the plaintiff the sum of one hundred five Dollars (\$105.00) a month, payable in two equal monthly payments of fifty-two and fifty one-hundredths Dollars (\$52.50) on the first and fifteenth days of each month hereafter until the death or remarriage of the defendant or until the further order of this Court." No reason

is made therein to the support of the child and under the holding of this Court in the Hoover case, supra, wherein the allowance was also made to the mother without mention of any portion thereof or any specific allowance for the support of the child, it was held to be insufficient to justify a modification of the decree. Here, it must also be kept in mind that under the parallel factual situation concerning defendant's income the same Court and Chancellor had already denied the previous petition, setting forth substantially the same grounds and proof of income.

Reference is made by witness Heisler to the unfitness of maintaining defendant's living apartment in the rear of his office rooms. Nothing in the record tends to prove that the defendant did not procure and retain living rooms next to his own office as a matter of personal preference and convenience or that he complained about the same or either sought to or was financially unable to procure living quarters in a private home or elsewhere during the years of such occupancy had he chosen or seen fit to do so.

The defendant, upon whom the burden of proof to show reduction of his income rests, could easily have brought with him his income tax returns concerning which inquiry was made and which would have shown both his gross and net income. He also stated that he kept his own books of account from which the same might have been proven. However, he chose to rely upon his memory alone by giving general statements and estimates of his income, all of which affirmatively show by his own admissions that there had been no reduction whatever in the amount of his annual net income, but, on the contrary, a slight increase therein.

Under the terms of the original decree, which became res judicata and binding on the Trial Court unless and until a material change in the status of the parties is shown, coupled with the similar issues presented and disposed of by the Court upon denial of the first petition and the defendant's failure to show a substantial change in his net income and living conditions of the parties, we hold that

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this Court in the Haver case, supra, wherein the allowance was
also made to the mother without mention of any portion thereof or
any specific allowance for the support of the child, it was held to
be insufficient to justify a modification of the decree. Here, it
must also be kept in mind that under the present factual situation
concerning defendant's income the same Court and Chancellor had
already denied the previous petition, setting forth substantively
the same grounds and proof of income.
Reference is made by witness to the affidavit of
defendant's living expenses in the sum of \$1,000
per month. Nothing in the record tends to prove that the defendant did
not procure and retain the same from his own income as a
matter of personal preference and convenience, or as to the
amount of such expense, and the Court is bound to make such
The defendant, upon whom the burden is placed to prove
that of his income there, could easily have made out which would
income tax returns concerning which I testify that he did not
have shown both his gross and net income. He also stated that he
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proved. However, he chose to rely upon the memory alone by giving
general statements and estimates of his income, of which nothing
actively show by his own admissions and there had been no suggestion
whatsoever in the amount of his annual net income, but, on the contrary,
a slight increase therein.
Under the terms of the original decree, which between the
parties was binding on the trial court unless and until a material
change in the status of the parties in fact, occurred with the parties
issues presented and disposed of by the Court upon appeal of the
trial petition and the defendant's failure to show a substantial change
in his net income and living expenses of the parties, we hold that

the Chancellor below erred in reducing the amount of the alimony from \$105 to \$50 per month and that the order making such reduction should be set aside and the amount of alimony provided for in the original decree should be continued in force until a substantial change in the status of the parties is shown which would justify an order modifying the same.

We, therefore, reverse the order of the Circuit Court of Sangamon County entered on March 11, 1944, reducing the monthly allowance of alimony from the sum of \$105 per month to \$50 per month and the cause is remanded to said Court with directions to vacate the order modifying the decree and allow plaintiff to receive payments as heretofore provided in the original decree.

REVERSED AND REMANDED
WITH DIRECTIONS.

the Commissioner before entered in reducing the amount of the alimony from \$100 to \$50 per month and that the order making such reduction should be set aside and the amount of alimony provided for in the original decree should be continued in force until a substantial change in the status of the parties is shown which would justify an order modifying the same.

No, therefore, reverses the order of the Circuit Court of Sangamon County entered on March 11, 1944, reducing the monthly allowance of alimony from the sum of \$100 per month to \$50 per month and the same is remanded to said Court with directions to vacate the order modifying the decree and allow plaintiff to re-ceive payment as heretofore provided in the original decree.

WALTER H. B. BROWN
ATTORNEY GENERAL

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STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

October Term, A. D. 1944

Term No. 44M4

Agenda No. 8

ANN BOYD,
Petitioner and Appellant,
vs.
THE PEOPLE OF THE STATE OF
ILLINOIS,
Respondent and Appellee.

324 I.A. 225¹

Appeal from the
County Court of
Madison County,
Illinois.

BRISTOW, P. J.

This case comes to this Court following an appeal from the County Court of Madison County, Illinois, questioning the propriety of an Order entered in that Court, dismissing a Petition to change the custody of two minor children of the Petitioner-Appellant. The Appellant filed a Petition in the County Court, praying that the custody of her children, Florence Elizabeth Boyd, aged six years, and Myrtle Inez Boyd, aged ten years, be transferred from the Huddleson Baptist Home at Centralia, Illinois, to Appellant, Ann Boyd.

In brief, Appellant's petition alleges that she had been deprived of the custody of her children by an order entered by the County Court of Madison County on September 13, 1939, and that it is to the best interest of said children and society generally that she recover the custody of her said children. The Court below found against the Appellant, and also denied a Petition for rehearing. This order the Appellant seeks to reverse.

It appears from the evidence that the Appellant resides

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1894 - 1895
1896 - 1897
1898 - 1899

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at 2521 Sidney Street in the city of Alton, Illinois. At the time of the hearing on the original petition she lived with her husband and four children, all minors, consisting of the two girls in question and a pair of twins, a boy and a girl. Appellant was divorced from her husband, Bert Boyd, in 1941. Bert Boyd works at the Alton Boxboard and Paper Company, and pays Appellant \$50.00 per month for the support of herself and two children. The neighborhood in which the Appellant has lived throughout these proceedings is mixed colored and white. The only witnesses appearing on behalf of Appellant was herself and husband. No more than a casual reading of their testimony reveals that neither were very convincing witnesses. Cal

The Appellant's principle contention in her brief and argument to reverse this finding is that the County Court's decision was contrary to the manifest weight of the evidence. With this contention we cannot agree. It is apparent from a careful reading of the transcript that any Court can only with difficulty resist the conclusion that the twin children were probably the descendents of a negro father. During the period of two years prior to their birth the home of the Appellant was frequently visited by one Sam McCrady, a colored man who lived nearby. The twin children, with their color and kinky hair, had all the appearances of children with negro characteristics. Without detailing all the facts which support this conclusion, suffice it to say that several disinterested witnesses testified to facts and circumstances which compel this Court to the conclusion that the home of the Appellant was and is entirely inadequate, and that it is to the best interests of the girls in question that they remain where they are. It further appears that the Appellant has failed to show any change or improvement in her home or circum-

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stances of living that had justified the lower Court in changing the decree that it entered in 1939.

We are well convinced that the County Court was correct in determining that it was to the best interests of Florence Elizabeth Boyd and Myrtle Inez Boyd, and also to the best interests of society generally, that no change in Custody Order be entered. The judgment entered by the Court below is therefore affirmed.

JUDGMENT AFFIRMED

Abstract

FILED

OCT 27 1944

David J. Mallett

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS



FILED

OCT 27 1944

David J. Mallett
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

October Term, A. D. 1944

Term No. 44M2

Agenda No. 6.

FLORENCE L. NASH, Administra-
trix of the Estate of WALTER
H. NASH, deceased, and
Guardian of the Estate of
DOROTHY NASH, a minor,

Plaintiff-Appellee,

vs.

JAMES IRA WELCH,

Defendant-Appellant.

324 I.A. 225²

Appeal from the

Circuit Court of

Madison County,

Illinois.

CULBERTSON, J.

This is an appeal from two judgments in favor of FLORENCE L. NASH, Administratrix of the Estate of WALTER H. NASH, deceased, in the sum of \$7500.00, and as Guardian of the Estate of DOROTHY NASH, a minor, in the sum of \$2500.00, respectively, as against JAMES IRA WELCH, Appellant herein. The \$7500.00 judgment was based on the wrongful death of Walter H. Nash, and the \$2500.00 judgment was for injuries sustained by the minor, Dorothy Nash, in a collision, on May 30, 1942, with the car of Appellant (hereinafter called defendant).

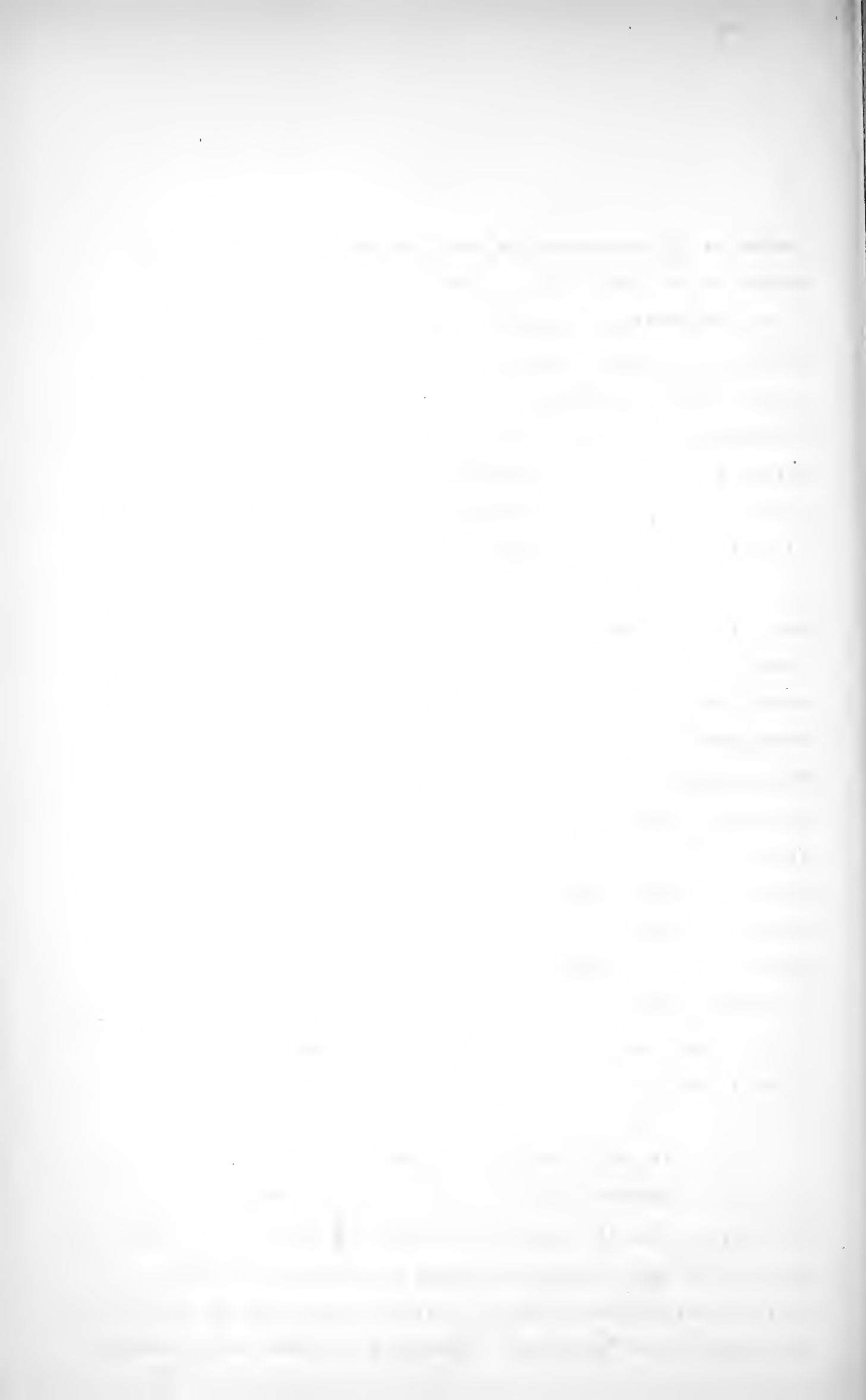
The causes of action were joined in one complaint and arose out of the same transaction, the personal injuries of the minor, Dorothy Nash, and the death of her father, Walter H. Nash, being occasioned as the result of a collision between an automobile which was being driven by the decedent, Walter H. Nash, and an automobile driven by the defendant, near a highway intersection immediately west of Hamel, Illinois. The minor was riding as a



passenger in the automobile being driven by her father. The complaint was originally composed of four counts, two of which were predicated upon ordinary negligence, and two of which were based upon charges of wilful and wanton negligence. At the close of plaintiff's evidence, on motions for directed verdicts by defendant as to each count of the complaint, the Court below directed a verdict, peremptorily as to each of the wilful and wanton counts, so that the verdicts and judgments now under consideration are based entirely on the negligence counts.

The evidence discloses that the deceased, Walter H. Nash, was driving along a concrete state highway in an easterly direction, accompanied by his minor daughter. The road was dry and the day was clear and sunny. As the decedent approached a point where a road known as the "Bloom road" intersects the state highway, the defendant was driving his car in a northerly direction on the Bloom road, which was an oiled or cindered road, approaching the intersection. A state stop sign was erected at the point where the Bloom road intersects the state highway. The evidence clearly shows that the defendant did not stop before crossing the intersection, but continued on across and collided with the Nash car, overturning it. As the result of the collision, Walter H. Nash died the same night and Dorothy Nash, the minor child, suffered several fractures of the skull, including one at the base of the brain.

The defendant assigns a number of errors on appeal to this Court, but indicates that the appeal presents only two questions for review, (First) Whether the plaintiff sustained the burden of proof in the case, upon the element of due care and caution on the part of plaintiff's intestate, Walter H. Nash, and the plaintiff's minor ward; and (Secondly) Whether the amounts of the verdicts



found by the jury were supported by sufficient evidence of substantial damages.

We have carefully reviewed the entire record in this cause and do not feel that there is any justification for a reversal of the judgments entered in the lower Court. While it is true that there is no direct evidence of due care on part of plaintiff's intestate, the evidence, which clearly establishes that Nash was driving on the state highway and that Welch was approaching the state highway, justified the conclusion of the jury that the plaintiff's intestate did not fail to use due care and caution, and that the negligence of the defendant was the cause of the injury. The deceased had the right to assume that the defendant would stop and nothing in his action or in the record tends to show that he was not using due care and caution in driving along the highway. Similarly, the evidence in the record shows that insofar as the minor is concerned (she was less than 9 years old at the time of the accident, and was 10 years old at the time of the trial), as a result of the accident, she stated, in a statement which was made part of the record, that she had no recollection of the accident itself, although she remembers seeing the defendant's car. This statement was incorporated in a doctor's report of the condition of the minor, which was introduced in evidence without objection, even though she did not testify.

Due care on the part of the plaintiff's intestate, and the plaintiff's ward, was not required to be established by direct and positive proof, but such care on the part of such parties may be inferred from the facts and circumstances in the case (BLUMB vs. GETZ, 366 Ill. 273; GRAHAM vs. DRESSEN, 292 Ill. App. 15).

As stated in the case of STACK vs. EAST ST. LOUIS RY. CO., 245 Ill. 308, at page 310, "Whether the evidence tends to prove



such care is a question of law, which a Court can determine adversely to the plaintiff only when no other conclusion can reasonably be drawn from uncontradicted facts and from the evidence favorable to the plaintiff." Under the facts in the record in the instant case, the question of due care was clearly one for the jury, and the conclusion of the jury that plaintiff's intestate and plaintiff's ward were in the exercise of due care and caution is conclusive upon this Court.

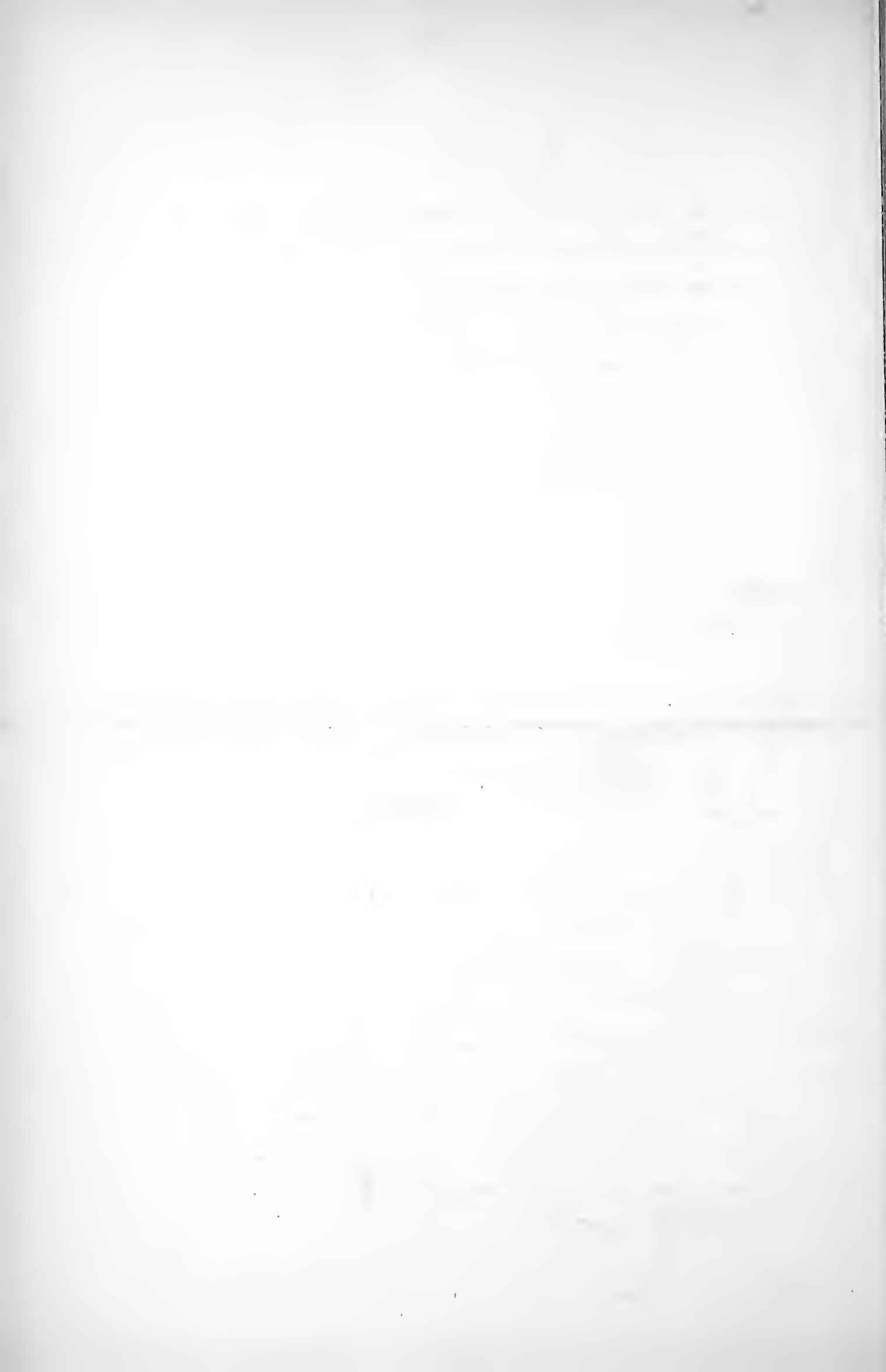
Similarly, we do not believe that there is any basis for the contention that the verdicts of the jury were excessive, under the facts in evidence. The testimony disclosed that Walter H. Nash was employed as an oil inspector for the State of Illinois, for which he received a monthly salary; that he owned and operated a grocery store in Wood River, Illinois; and that his health was excellent at the time of the accident. The deceased was only 44 years of age. His family had the right to a reasonable expectation of pecuniary benefit from his continued life. The verdict of the jury fixing such pecuniary loss at \$7500.00 is amply justified by the evidence and will not be disturbed.

As to the \$2500.00 verdict for the injuries to plaintiff's minor ward, the evidence shows that the child suffered several fractures of the skull, was in the hospital for four weeks, and remained bedfast for an additional two weeks, and that it took her three weeks to learn to walk after she left her bed. The hospital, doctor and nurses bills alone, amounted to \$710.30. The \$2500.00 verdict was clearly not excessive for such injuries.

The judgments of the Circuit Court of Madison County will, therefore, be affirmed.

Judgements affirmed.

Abstract.



FILED

OCT 27 1944

David J. Mallett
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

October Term, A. D. 1944

Term No. 44M8

Agenda No. 4.

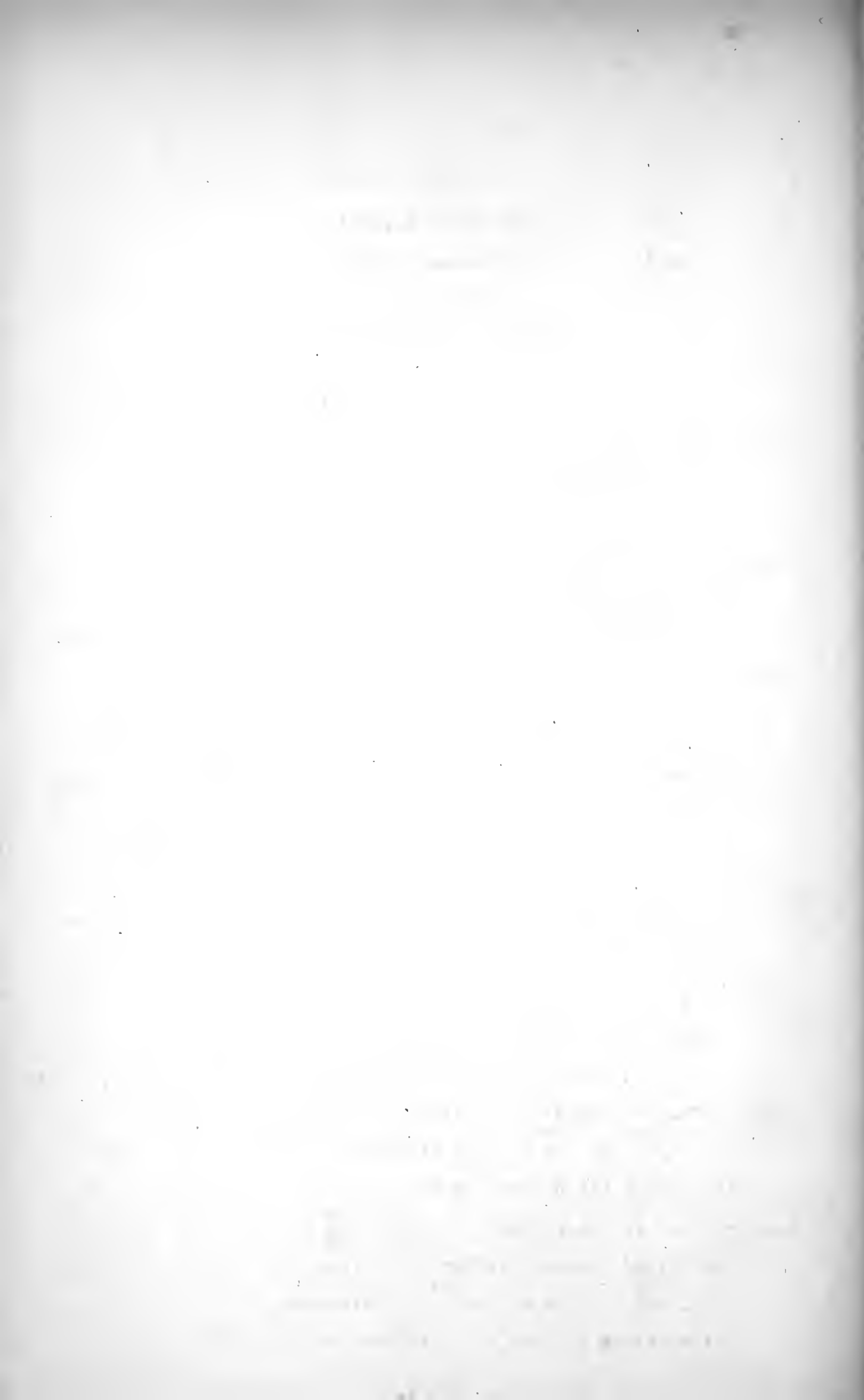
ALFRED DeSAUTELS,
Plaintiff-Appellee,
vs.
ALVIN SMITH, CLIFFORD MOTT,
GORDON MOTT, SOL WINTERS,
Defendants-Appellants.)

324 I.A. 226¹
Appeal from the
Circuit Court of
Hardin County.

CULBERTSON, J.

This is an appeal from a decree of the Circuit Court of Hardin County, by the terms of which the defendants, ALVIN SMITH, GORDON MOTT, CLIFFORD MOTT and SOL WINTERS, were permanently enjoined from "committing any acts that will damage or injure mines or equipment thereon, and from molesting any miner or other workman whom plaintiff, ALFRED DeSAUTELS, may place at said mine, and from interfering in any way with the plaintiff in the operations of said mine."

From the evidence in this case it appears that on the 8th day of October, 1943, the plaintiff herein presented his complaint, praying for an injunction restraining the defendants herein from the entry upon and the further operating of a certain flourspar mine then under his control under a lease from the owners. Plaintiff alleged that in consequence of a special priority permit he agreed with the United States Government to produce a thousand tons of ore per month, and that he employed the defendants herein for an indefinite period of time to mine; that he was to furnish all



necessary machinery and equipment and defendants were to do the work of mining the ore at a fixed price per ton. He further alleged that he had furnished all necessary machinery and equipment and paid the defendants for all work done. The plaintiff further charged that defendants failed to produce the required tonnage, thus endangering the loss of his priority permit, and that the owners of the mine were threatening to cancel his lease, and charged that the defendants carelessly and negligently damaged the machinery and refused to let other miners work in the mine, and that they forcibly seized and took possession of the mine, and threatened damage to his property.

The defendants, by their answer, denied all of the material allegations of the complaint, and by way of counter-claim alleged they had no knowledge of the alleged permit and agreement to produce 1,000 tons per month, until about two weeks before the service of the Writ in this case. They also alleged that the mine was old and had long been abandoned, and that they had performed arduous and dangerous work before reaching a producing point in the mine, and they also set forth that whether the mine contained ore in paying quantities was seriously doubtful. They alleged that the plaintiff had failed to furnish all machinery and equipment, and that the machinery and equipment furnished was old and inadequate for the practical operation of the mine.

The temporary injunction was awarded, without notice, and after a motion to dissolve same had been overruled, on final hearing, the injunction was made permanent, and it is from that decree that this appeal is prosecuted.

Under the evidence it appears that about July 1, 1943, the plaintiff herein leased a long abandoned mining plant from the owners thereof, and that he later orally contracted with the defend-



ants herein to reopen and to mine ore therefrom. It appears that plaintiff was to furnish the necessary machinery and equipment and to provide props for timbering, and to pay the premium on Workman's Compensation Insurance, and to pay the defendants \$3.50 per ton for all ore mined and placed in a bin near the mouth of the tunnel. This \$3.50 per ton was subsequently raised to \$5.00 per ton. The defendants herein appear to have engaged in working the mine, and the relationship between them and their employers seems to have been fraught with a great many difficulties from its very inception. They do not appear to have had a contractual arrangement and relationship that proved satisfactory at all, and it finally culminated in the discharge of the defendants herein by the plaintiff. When plaintiff discharged the defendants it appears from the evidence that they refused to permit anyone to go upon the premises and a fair consideration of the evidence cannot but bring one to the conclusion that they did make some threats, and that by threats and intimidation, they refused the plaintiff the right to continue to operate under his lease.

After a very full and complete hearing, the Court, by its decree, found, among other things, that the counter-claim filed by the defendants herein should be dismissed for want of equity, except as to the amount of \$30.00 due to the defendants for mine props placed in said mine by them, and awarded them judgment for that amount. The Court further found that the temporary injunction previously issued, on October 8, 1943, should be made permanent, and the same was made permanent against the defendants, Alvin Smith, Clifford Mott, Gordon Mott, and Sol Winters, and they were permanently enjoined and restrained from committing any acts that will damage or injure the mines or the equipment thereon, and from molesting any miner or other workman whom plaintiff may place in

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said mine, and from interfering in any way with the plaintiff in the operations of said mine.

Many assignments of error are relied upon by the defendants herein for reversal of this decree, it being contended that the Court erred in awarding a temporary injunction, and that he erred in overruling the motion to dissolve the injunction, and that the findings and decree of the Court are contrary to the manifest weight of the evidence, and error is assigned on account of certain other findings of fact contained in the decree making the injunction permanent. It is also contended on this appeal that the counter-claim should not have been dismissed for want of equity.

We have very carefully examined all of the evidence in this case, and given consideration to each and every assignment of error set forth, and from an examination of the evidence and a consideration of the various assignments of error as made, we cannot but conclude that the Chancellor who heard this case and awarded the decree, had full and complete justification to do so under the factual situation as the same was developed in the evidence on the hearing of this case, and that to do so he acted in accordance with the law. The findings of a Chancellor, to whom a cause is submitted for trial, without a jury, is entitled to as much weight on controverted questions of fact as the verdict of a jury, and will not be set aside by an Appellate tribunal, unless it is manifestly against the weight of the evidence (ARLISKAS vs. ARLISKAS, 343 Ill. 112; KOCHMAN vs. O'NEILL, 102 App. 475, affirmed 202 Ill. 110; HEYMAN vs. HEYMAN, 210 Ill. 524; DOWGIALOWICZ vs. KEISTUTO SAVINGS & LOAN ASS'N, 54 N. E. (2d) 71, 322 App. 180).

This decree being correct and proper, the same is hereby affirmed.

Decree affirmed.

Abstract.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

October Term, A. D. 1944

Term No. 44M11

Agenda No. 3

NELL M. BELCHER,

Plaintiff-Appellant,

vs.

CITIZENS COACH COMPANY, INC.,
and ELIZABETH KEISER,

Defendants-Appellees.

Appeal from the

Circuit Court of

Madison County.

324 I.A. 226²

CULBERTSON, J.

This is an appeal by the Appellant, NELL M. BELCHER (hereinafter called Plaintiff) from a judgment notwithstanding the verdict, in favor of Appellees, CITIZENS COACH COMPANY, INC., and ELIZABETH KEISER (hereinafter called defendants). In the trial of the case in the Circuit Court of Madison County a jury had returned separate verdicts finding in favor of the plaintiff and assessing plaintiff's damages as against the defendant, Citizens Coach Company, Inc., at \$800.00, and as against the defendant, Elizabeth Keiser, at \$500.00.

The action was tried on a complaint which charged the defendant, Coach Company, with ordinary negligence, and the defendant, Keiser (who is the daughter of the plaintiff) with willful and wanton misconduct. The accident, on the basis of which the action was filed, occurred on April 8, 1943, at about eleven o'clock in the morning, on a sunny day, when the pavement was dry and the weather was mild. The defendant, Keiser, was driving her



husband's automobile in a southerly direction on Washington Avenue in the City of Alton, Illinois. In the automobile with defendant were her infant child, another passenger, and her mother, the plaintiff. The plaintiff was holding her grandchild upon her lap as the automobile proceeded south toward the intersection of Washington Avenue and East Broadway. Just north of the intersection of Washington Avenue and East Broadway, Washington Avenue, upon which the automobile was traveling, is intersected by another street called Bozza street. Between East Broadway and Bozza streets, Washington Avenue is only slightly upgrade, but beginning at Bozza street, Washington Avenue rises to a sharp grade to the north, for a distance estimated at 2,000 feet. It is a straight and unobstructed avenue.

There was evidence to the effect that one of the motor busses operated by defendant, Coach Company, was parked on the east side of Washington Avenue, just below the Bozza street intersection, with its front end headed into the curb, and its rear end extending out over the center line of the street. There were other automobiles parked along the west side of Washington Avenue just below Bozza street. Another motor bus of the defendant Company had turned south from Bozza street and was headed south on Washington Avenue. There was evidence to the effect that this bus was stopped east of the west curb of Washington Avenue and was parked almost directly across from the north-bound bus. The evidence indicated that the result was that the two busses occupied all but 5 or 5½ feet of the traveled portion of Washington Avenue. There was no other moving vehicular traffic on Washington Avenue between the automobile being driven by defendant Keiser, and the parked busses.

The plaintiff, who had been totally blind for about four years, was seated in the front seat of the automobile being driven



by her daughter, defendant Keiser. Another passenger was also seated between the defendant Keiser, and plaintiff. Defendant Keiser's child was in plaintiff's lap. Just before the car started downgrade the car had been stopped to prepare a bottle for the child, and thereafter the defendant Keiser started to drive south, down Washington Avenue toward Bozza street. The evidence shows that when she got within about 180 feet of the Bozza street intersection she saw the busses of the defendant Coach Company and the position of the busses. She could have avoided the collision which followed by stopping her car, or turning into a filling station entrance at the Bozza street intersection, or into Bozza street, but she did neither and continued forward without decreasing her speed, until she struck the rear end of the bus that was parked on the east side of Washington Avenue. There was also evidence that about four or five seconds before the collision, the defendant Keiser said, "We are going to have a wreck," and that the plaintiff said, "Why don't you stop?" The Keiser car had proceeded at a speed of about 30 miles per hour, without slackening of speed. The defendant Keiser stated that she thought there was room enough for the width of a car between the two busses, but that all of the space except about 5 or 5½ feet was occupied by the busses and she therefore struck the bus that was parked at an angle, near the rear wheel. The Keiser automobile was near the center of the intersection at the time. The collision caused the Terraplane automobile of the defendant Keiser to be completely demolished, and as a result thereof, plaintiff suffered a severe fracture of her right kneecap. After the accident she was taken to the Alton hospital where an operation was performed and the broken fragments of the kneecap were reunited. She remained in the hospital for five or six days after the operation, and



remained in bed at home for about three months. At the time of the trial she was still in pain, and was unable to move about freely because of her injury. The evidence indicated that her knee is 90% stiff, and that the condition is permanent. The medical expenses amounted to about \$450.00.

At the request of the defendant, separate verdicts were returned by the jury, as we have previously indicated. Motions for judgment non obstante veredicto were filed by defendants and plaintiff filed a motion for new trial on the ground that the verdicts did not adequately compensate her for the injuries and damages she sustained. The Court below allowed the motion for judgments notwithstanding the verdict as to both defendants, and at the same time sustained the plaintiff's motion for a new trial and ordered a new trial in the event the motions for judgment notwithstanding the verdict were reversed in the Appellant Court. It is contended by the plaintiff-appellant that the Court erred in entering judgment notwithstanding the verdict as to each of the defendants.

✓ (The sole question raised by the motions for judgment notwithstanding the verdict, in common with that of a motion to direct a verdict, is whether the evidence produced by plaintiff, together with all reasonable inferences drawn therefrom in its aspect most favorable to the plaintiff, tends to prove any cause of action stated in the complaint (TODD vs. S. S. KRESGE CO., 384 Ill. 524; MERLO vs. PUBLIC SERVICE CO., 381 Ill. 300). If so, the weight and credibility to be attached to plaintiff's evidence and other facts and circumstances shown, are questions for the jury.

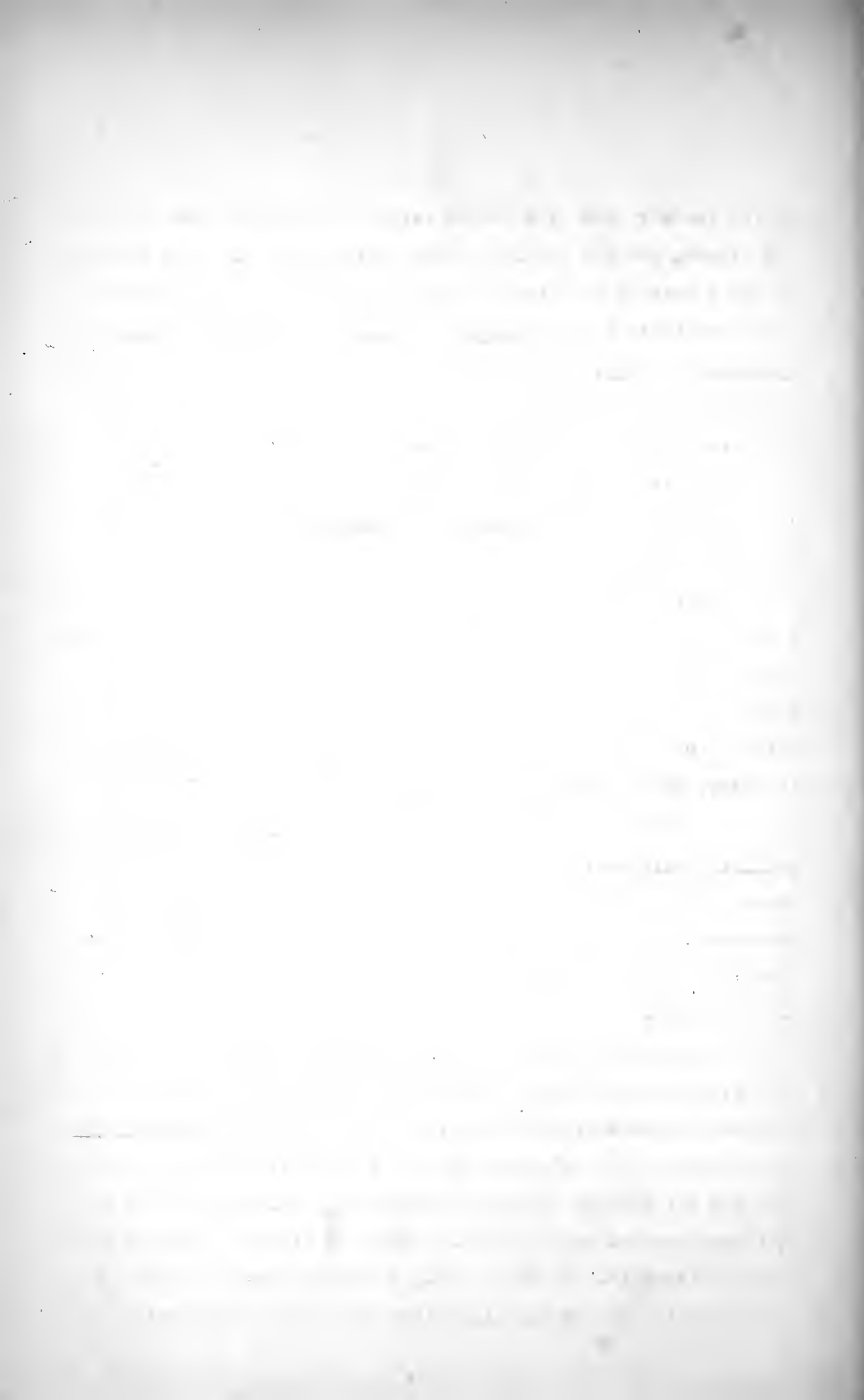
In the instant case there was evidence that the defendant Coach Company had parked its busses in such manner as to almost entirely obstruct the street. The parking of the south-bound bus



on the roadway side of vehicles parked on the west curb of Washington Avenue, and the parking of the north-bound bus at an angle on the east curb of the street, were in violation of provisions of the Motor Vehicle Act (Chapter 95½ ILLINOIS REVISED STATUTES, Sections 187 (Par. 12), 188). The blocking of a highway or overcrowding of a pavement has been held to constitute negligence which could constitute a proximate cause of a collision, even though negligence of a third party intervened in the chain of events leading to the injury (RHODEN vs. PEORIA CREAMERY CO., 278 Ill. App. 452, 467).

There was, thus, evidence in this case on the basis of which a jury could be justified in concluding that the defendant Coach Company was negligent and that such negligence was a proximate cause of the injury to plaintiff. The question of plaintiff's due care was one for the jury to determine (HELLWIG vs. LOMELINO, 309 App. 369, 375), and under the facts, plaintiff was not chargeable with the negligence of the defendant Keiser (THOMPSON vs. ATCHISON, T. & S. F. Ry. CO., 258 Ill. App. 123, 131). Under the facts, the question of whether or not defendant was negligent was for the exclusive determination of the jury, and it was error to sustain a motion for judgment notwithstanding the verdict as to defendant Coach Company.

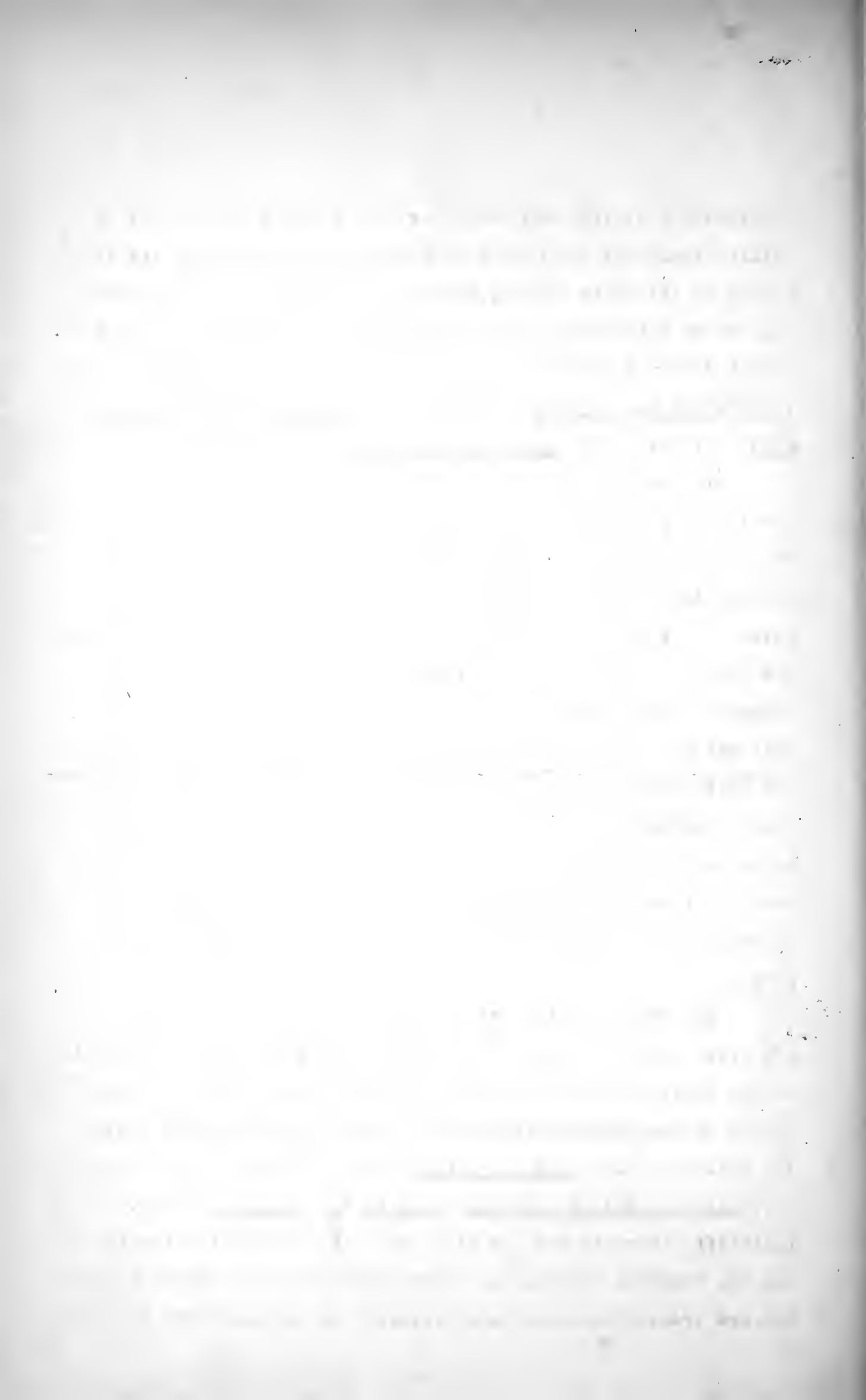
As to the willful and wanton charge against the defendant Keiser, the only evidence in the record which would tend to give support to such charge was recited above in the statement of facts to the effect that defendant did not reduce her speed or turn away into the oil station driveway, or Bozza street, and that she saw that the accident would probably occur and did not apply her brakes so as to avoid it. We do not believe that, under the facts, it is a case for the application of the willful and wanton doctrine. To



constitute a willful and wanton act the party doing the act or failing to do the act must be conscious of his conduct, and though having no intent to injure, must still intentionally disregard that known duty necessary to the person or property of another in a manner that constitutes a conscious indifference to consequences (BARTOLUCCI vs. FALLETTI, 382 Ill. 168; WALLDREN EXPRESS CO. vs. KRUG, 291 Ill. 472; CLARKE vs. STORCHAK, 384 Ill. 564).

In the instant case, a review of the record fails to disclose any evidence which would give support to the conclusion that there was an intentional disregard of a known duty necessary for the safety of the person of her mother on part of the defendant Keiser. Her testimony is to the effect that she thought that there was enough space between the two busses and that that was the apparent reason she did not slow down or turn into the intersection. That defendant Keiser was guilty of negligence is unquestionable, but there was no basis for submitting the issue of willful and wanton misconduct on the part of defendant Keiser to the jury, under such state of the evidence, and the conclusion of the Court that a motion for judgment notwithstanding the verdict should be granted as to the judgment against defendant Keiser, was clearly proper.)

The action of the Trial Court in allowing the motion for new trial and in granting a new trial for plaintiff was justified on the basis of the inadequacy of the verdicts in view of the extent of the injury suffered by plaintiff (MONTGOMERY vs. SIMON, 309 Ill. App. 516; LINA vs. GELLES, 314 Ill. App. 659). Under Rule 22, ILLINOIS REVISED STATUTES, Chapter 110, Section 259.22, the plaintiff obviously had the right to file a motion for new trial and the Court in entering an order thereon had the right to grant the new trial, contingent upon reversal of the judgments entered



notwithstanding the verdict. It was apparently the intent of the Legislature and the Supreme Court to eliminate circuitry of action and to provide for the making of motions for new trial in the Trial Court after the close of the case and prior to appeal. We have been unable to discover any cases and have been referred to none which determine when a party whose verdict has been set aside upon motion for judgment notwithstanding the verdict, is required to make a motion for new trial. The making of such motion immediately thereafter in the Trial Court was obviously timely. We are not required, in this case, to determine whether such motion could be made after reversal of judgment on appeal.

The judgment of the Circuit Court of Madison County in bar of plaintiff's action as against defendant, CITIZENS COACH COMPANY, INC., is accordingly reversed, and such cause is remanded to the Circuit Court of Madison County for further proceedings in accordance with the views expressed in this opinion. The judgment of such Circuit Court in bar of the action against the defendant, ELIZABETH KEISER, is herewith affirmed.

Reversed and remanded in part.

Affirmed in part.

Abstract

FILED

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FOURTH DISTRICT OF ILLINOIS

42401

WILLIAM J. SHEPPARD,
Appellee,

v.

WALTER J. CUMMINGS and
DANIEL C. GREEN, as Receivers,
etc., et al., doing business
as CHICAGO SURFACE LINES,
Appellants.

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

3241A. 227

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

William J. Sheppard, as employer, brought suit under section 29 of the Workmen's Compensation Act (Ill. Rev. Stat. 1943, ch. 48, pars. 138 et seq.) to recover damages for injuries sustained by Gustav Olson, his employee, who was struck by one of defendants' cars while in the course of his employment. Sheppard paid Olson \$4,000 disability and \$176 for necessary first aid, medical, surgical and hospital services under an award of the industrial commission, and thereafter filed suit against defendants to recover that amount. The jury returned a verdict for \$4,176 in favor of Sheppard. Motions for judgment notwithstanding the verdict and, in the alternative, for a new trial, were filed by the defendants and overruled, and thereafter judgment was entered on the verdict, from which defendants appeal.

The salient facts disclose that Sheppard had a contract with the city to repave Fullerton avenue, an east and west street, outside of the street car right-of-way, from Ashland to Western avenues. At about 1700 west the Chicago and North Western Railway passes over Fullerton avenue by means of a viaduct, underneath which the street is depressed, with an incline on both sides up to the normal level of the street. The distance from the street car tracks to the south curb is about 20 feet. The paving had progressed on the south side of Fullerton from Ashland to the viaduct. Between the

WILLIAM J. SHEPARD,
Appellee,

v.

WALTER J. CHAPMAN and
DANIEL J. CHAPMAN, as Appellants,
et al., doing business
as CHICAGO BURNING OILS,
Appellants.

CHICAGO BURNING OILS,
Appellants,

vs. WILLIAM J. SHEPARD, Appellee.

William J. Shepard, as employer, brought this suit under section 52 of the former's Compensation Act (Ill. Rev. Stat. 1943, ch. 43, pars. 1-5 of sec. 52) to recover damages for injuries sustained by Walter Chapman, his employee, who was struck by one of the defendant's cars while in the course of his employment. The record shows that Chapman was injured while for necessary first aid, medical, and hospital services under an order of the Industrial Commission, and thereafter filed suit against the defendant to recover that amount. The jury returned a verdict for \$4,175 in favor of Chapman. Motions for judgment notwithstanding the verdict and, in the alternative, for a new trial, were filed by the defendant and overruled, and thereafter judgment was entered on the verdict, from which defendant appeals.

The salient facts disclose that Chapman had a contract with the city to repave Fullerton Avenue, on east and west street, outside of the street car right-of-way, from Ashland to Western Avenues. At about 1700 west the Chicago and North Western Railway passes over Fullerton Avenue by means of a viaduct, underneath which the street is depressed, with an incline on both sides up to the normal level of the street. The distance from the street car tracks to the south curb is about 20 feet. The paving had progressed on the south side of Fullerton from Ashland to the viaduct. Between the

south rail of the east bound street car track and the curb there was a trench about one foot deep and some eighteen inches wide, in which bricks were thereafter to be laid. The overhang of street cars used on Fullerton avenue extended twenty-two inches beyond the rail. Adjoining the viaduct on the east was an alleyway from twelve to twenty feet wide, running from the street to the south. The construction crew had a wooden bridge, made of loose boards, which they had placed north and south over the soft concrete so as to avoid walking thereon. The accident occurred in the early evening of October 11, 1938. The road between Ashland and Western avenues was blocked all the way, and there were construction signs placed at intersections reading, "Road under Construction; travel at your risk." Torpedo lights were put up on the south side of the street car tracks while the paving was being done. These lights burned four or five inches high and were placed from twenty-five to fifty feet apart all along the way and at intervals of about twenty feet where the men were working.

On the day of the accident Gustav Olson, the injured employee, reported for work at about 4:30 p.m. The concrete had been poured before he arrived. His duty consisted of edging or smoothing the concrete as a final operation in constructing the pavement. At the time of the accident Olson was working opposite the center of the alleyway, about six feet west of the wooden bridge, in a trench or ditch about a foot deep and eighteen inches wide, using his "edger" and a cloth to smooth the edges of the concrete, working with his right hand, stooping over and facing toward the southeast. In doing his work he would move back and forth and change his position, and there is some conflict in the evidence as to whether he was standing in the ditch at the time of the accident or to the south thereof. He testified that he was in the ditch, saw a bright light, which was

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evidently the headlight of the street car as it emerged from the depression under the viaduct to the street level, and heard the rumble of wheels just as the street car struck and threw him out of the trench, and that no gong or bell was sounded by the motorman before the impact. Olson had been a cement finisher since 1917, was 59 years of age at the time of the accident and in good health, having had only one injury about fifteen years previously. He was rendered unconscious, picked up by Charles Liebal, the foreman in charge of the crew, with the aid of another man, and carried across the street, where he regained consciousness before being taken to the hospital.

Liebal had just completed running an expansion joint in the concrete next to the bridge and saw Olson working in the trench about six feet from the bridge immediately before he was struck. Preceding the accident Liebal walked on the bridge to the sidewalk and then in a southeasterly direction across the sidewalk, with his back turned toward the street car. He first saw the street car when it came out from underneath the viaduct. He testified that the car was approaching about thirty miles an hour. Olson was then about twenty feet from him, and Liebal states that he did not have time to say anything or utter a warning to anybody before the accident occurred. When he first noticed the light of the street car he turned around, and almost instantaneously both the wooden bridge and Olson were rolling along on the concrete. The impact moved the bridge about four or five feet and Olson was lying thirty to forty feet from where he had been standing. Liebal testified that he did not hear the noise of the car, but saw the light, and that no bell or warning was sounded.

Carl Reinmiller, the motorman, testified on direct examination that when he passed over the depression under the

evidently the height of the street can be ascertained from the depression under the street level, and heard the rumble of wheels just as the car was about to pass and threw him out of the trench, and that he fell or fell was sounded by the car when it was about to pass. There has been a recent investigation which was made at the time of the accident and in the hospital, having been only one injury about fifteen years previously. He was rendered unconscious, and the car was about to pass the woman in charge of the car, and the car was about to pass, and carried her as a result, and she was rendered unconscious before she was in the hospital.

Nichol had been standing on the sidewalk in the concrete walk to the right of the street, and in the trench about six feet from the sidewalk, before he was struck. According to the testimony on the bridge to the sidewalk and then in a second or two he fell across the sidewalk, with his head down, and his feet under the car. He first saw the car when it was about to pass near the sidewalk. He testified that the car was about to pass about thirty miles an hour. From his testimony it may be seen that he did not have time to say anything or utter a sound to anybody before the accident occurred. When he first noticed the light of the car, he turned around, and almost instantaneously he fell on the sidewalk and Olson were walking along on the sidewalk. The impact moved the bridge about four or five feet and Olson was lying thirty to forty feet from where he had been standing. Nichol testified that he did not hear the noise of the car, but saw the light, and that he fell or was thrown was sounded. Carl Reinhardt, the motorist, testified on direct examination that when he passed over the depression under the

viaduct he saw Olson about seventy-five feet ahead on a plank running from the rail to the curb and that he rang his gong and slightly stepped up the speed of his car; that when the car was within ten feet of Olson it was going about twelve miles an hour; that Olson was stooped over, facing southeast, about six feet from the rail; that Olson then started to back up and as he did so Reinmiller sounded the gong and applied his brakes; that he heard Olson strike the side of the door, and when he looked out saw him lying on the street at about the center of the car and approximately three feet from the bridge. On cross-examination Reinmiller stated that there were no men working under the viaduct; that when he saw Olson seventy-five feet ahead he was three feet from the rail and took one step to the south. Reinmiller then started to pick up speed. He was then about twenty-five feet from Olson, having traveled fifty feet, and Olson was about six feet away, bending over, working. He states that Olson then took one step back and the car "was right on top of him." According to his version of the accident, Olson backed into the side door of the car and Olson's face was never turned toward the street car at any time. It appears that Reinmiller's deposition had been taken in December 1938, prior to the trial, and upon hearing plaintiff's counsel showed some minor discrepancies between the statements then made and his testimony adduced upon the trial.

Another witness for defendants, Frank Cirocke, operated an automobile repair shop on the north side of Fullerton avenue about 180 feet east of the alley. He was the only other occurrence witness who testified upon the hearing. According to Cirocke, Olson was working about 150 feet east of the viaduct on the south side of the street, and he noticed the street car under the viaduct, traveling five or ten miles an hour. Before the accident he observed a man (Olson) working

there, who was standing about four or five feet from the rails, facing east. As the car came up the grade he heard a crash of brakes, ran over and saw Olson lying on the pavement three feet east of the plank which they called a bridge, and lying about the center of the street car. He viewed the accident at an angle of about forty-five degrees and could not see the actual impact.

Both parties were admittedly subject to the provisions of the Workmen's Compensation Act, and it may therefore be conceded that it was incumbent on plaintiff, both by his pleading and proof, to bring himself within the requirements of the statute as a condition to his right of recovery. (Hartray v. Chicago Railways Co., 290 Ill. 85; Carlin v. Peerless Gas Light Co., 283 Ill. 142; In re Estate of Julia B. Rackliffe, 366 Ill. 22.) The applicable part of section 29 reads as follows: "Where an injury or death for which compensation is payable by the employer under this Act was not proximately caused by the negligence of the employer or his employees, and was caused under circumstances creating a legal liability for damages in some person other than the employer to pay damages, such other person having also elected to be bound by this Act, or being bound thereby under section three (3) of this Act, then the right of the employee or personal representative to recover against such other person shall be transferred to his employer and such employer may bring legal proceedings against such other person to recover the damages sustained, in an amount not exceeding the aggregate amount of compensation payable under this Act, by reason of the injury or death of such employee." As the principal ground for reversal defendants take the twofold position (1) that the complaint does not state a cause of action under section 29; and (2) that plaintiff failed to show affirmatively not only

that Olson was in the exercise of due care for his own safety, but that "all of his [Sheppard's] employees" were likewise free from negligence.

With respect to the first contention, it appears that the complaint substantially alleged that on October 11, 1938 Olson was employed by plaintiff in connection with paving work being done on Fullerton avenue; that "then and there *** the plaintiff, William J. Sheppard, and said Gustav Olson, and each of them, were in the exercise of ordinary care for the safety of said Gustav Olson;" that defendants, by their agents or servants, were operating and controlling a certain street car in an easterly direction along and upon Fullerton avenue; that there were divers signs erected along the street reading "Road under Construction," and in addition thereto the highway was well lighted by means of torpedo lights; that defendants, by their agents or servants, were guilty of one or more acts of negligence specified in the complaint; that as a proximate result of said negligence and misconduct on the part of defendants, Olson was injured; that plaintiff and defendants were operating under the provisions of the Workmen's Compensation Act; that Olson was acting in the scope of his employment by plaintiff; that subsequent to the injury he applied for adjustment of his claim with the industrial commission of Illinois, naming plaintiff as a respondent; that pursuant to hearing, Olson was awarded the sum of \$4,000, in addition to necessary first aid, medical and hospital expenses; and that by reason of the negligence and misconduct of defendants, plaintiff became entitled to recover the amount of the award by the industrial commission. Defendants' answer denied "that plaintiff or his employe, Gustav Olson, was in the exercise of ordinary care for the safety of said Gustav Olson, at any of the times mentioned," and also denied substantially all

1. The first group of people who are not in the labor force are those who are not in the labor force because they are not in the labor force.

YOU ARE PROBABLY ASKING YOURSELF HOW TO GET A COPY OF THIS

11. "The first of the 'new' religions is the 'New Age' movement, which is a blend of Eastern and Western religions, and is based on the idea of the 'law of attraction'." (p. 11)

the material averments of the complaint, including the manner in which Olson is alleged to have been injured and his right of recovery.

The condition of liability was such that the complaint could have been amended if defendants had challenged its insufficiency by appropriate motion (Holden v. Schley, 355 Ill. 545), and if defendants felt that other employees might possibly have been involved, they could have requested a more specific statement in accordance with paragraph 1 of section 42 of the Civil Practice Act (Ill. Rev. Stat. 1943, ch. 110, par. 166), or they could have challenged the complaint by appropriate motion; but by their failure to object to the sufficiency of the complaint and by proceeding to trial on the allegations thereof and the averments of their answer, they waived the objection as to form or substance. Starr v. Rossin, 302 Ill. App. 325. Moreover, it appears that the only motion filed by defendants was for a directed verdict, and such a motion could not question the legal sufficiency of the complaint. Farmer v. Alton Bldg. & Loan Ass'n, 294 Ill. App. 206. It also appears that defendants offered instruction No. 12, which was given by the court and which reads as follows: "Before plaintiff, Wm. J. Sheppard, can recover in this case under his complaint against the street railway companies, he must prove each of the following propositions by a preponderance of the evidence: (1) That Gustav Olson was in the exercise of due care and caution for his own safety at and just before the time of the accident; (2) That defendants were guilty of the particular negligence charged in the complaint. (3) That such alleged negligence (if in fact there was negligence) was the proximate cause of the accident. (4) That Gustav Olson was not guilty of any negligent act contributing in any way to cause the injury complained of. (5) That the injury to

Gustav Olson was not proximately caused by the negligence of plaintiff or the employees of Wm. J. Sheppard. If after considering all the evidence, you believe that plaintiff has failed to prove any one of the foregoing propositions by a preponderance of the evidence then you should find the defendants not guilty." After verdict, defendants did not file a motion in arrest of judgment, but merely stated generally in their motion for a judgment notwithstanding the verdict that the complaint was insufficient. It therefore appears that the contention concerning the purported defect was raised for the first time in this court. A similar situation arose in Carson-Payson Co. v. Peoria Terrazzo Co., 288 Ill. App. 583, wherein all the parties involved came within the provisions of the requirements of the Workmen's Compensation Act. The jury in that case returned a verdict in favor of the plaintiff employer, and the trial court entered judgment for defendant notwithstanding the verdict. In reversing the judgment the court called attention to defendant's contention that the complaint was fatally defective in that it failed to allege that plaintiff was free from contributory negligence, and in answer to that contention said: "Conceding that the complaint in the instant case was defective in that there was no allegation to the effect that appellant [plaintiff] was free from contributory negligence, that defect was not objected to in the trial court and under the provisions of section 42 of the Civil Practice Act, which provides that all defects in pleadings, formal or substantial, not objected to in the trial court are waived, the sufficiency of this complaint cannot, for the first time, be challenged in this court. Appellee [defendant], in the trial court, never filed any motion in the nature of a demurrer to dismiss the complaint. It never filed any motion

Ernest Olson was not promissory because of his negligence of
plaintiff or the employees of the company. It is not
considering all the evidence, but believe that the plaintiff
has failed to prove any one of the foregoing propositions
by a preponderance of the evidence and a verdict in favor
of the defendant is proper. The defendant's negligence was
not the cause of the injury to the plaintiff, and the plaintiff
was injured in the fall from the building. The plaintiff
the verdict that the defendant was negligent. It is not
fore apparent that the defendant committed a negligent
act and caused the injury to the plaintiff. The plaintiff
similar situation arose in *Johnson v. Johnson*, 101 W. 2d 100
1941, 101 W. 2d 100, 101 W. 2d 100, 101 W. 2d 100, 101 W. 2d 100
involved the same facts and provisions of the negligence of
the defendant company. The jury in that case re-
turned a verdict in favor of the plaintiff. The plaintiff
trial court entered judgment for the plaintiff. The plaintiff
the verdict. In reversing the judgment the court relied
attention to the defendant's contention that the complaint was
fatally defective in that it failed to allege that plaintiff
was free from contributory negligence, and in answer to that
contention said: "Considering that the complaint in the instant
case was defective in that there was no allegation to the
effect that plaintiff [plaintiff] was free from contributory
negligence, that defect was not objected to in the trial court
and under the provisions of section 45 of the Civil Practice
Act, which provides that all defects in pleadings, formal or
substantial, not objected to in the trial court are waived,
the sufficiency of this complaint cannot, for the first time,
be challenged in this court. Appellee [defendant], in the
trial court, never filed any motion in the nature of a
demurrer to dismiss the complaint. It never filed any motion

in arrest of judgment, did not question the sufficiency of the complaint in its answer and did not urge any defect in pleading as a reason in support of its motion for judgment notwithstanding the verdict. *** Furthermore, counsel for appellee and the trial court both treated the complaint as sufficient in this respect inasmuch as the record discloses that the instructions offered by the defendant *** and given by the court, told the jury, not only once but several times, that proof of due care on the part of plaintiff, as well as of King [the injured employee], was a material allegation of plaintiff's complaint and that unless such allegation was proven by a greater weight of the evidence, the jury should find the defendant not guilty." We think the Carson-Payson case is a fair expression of the law applicable to the circumstances here presented. Defendants at all times treated the complaint as sufficient, denied the allegations thereof, offered instructions which raised primarily only questions of fact, filed no motion in arrest of judgment, and in fact never made the contention that the complaint was insufficient until the matter was presented here on appeal.

The second principal defense interposed is that plaintiff failed to prove that all of his employees were in the exercise of due care for the safety of Gustav Olson. Upon the record presented there was only one other employee involved, Charles Liebal, the foreman. Defendants insist that since plaintiff seeks to recover under section 29 of the Act, he must bring himself within the conditions and requirements of the statute and affirmatively prove that Liebal, as well as Olson, was in the exercise of care for Olson's safety. We have already indicated from an examination of the record that Liebal could not have warned Olson in time to have avoided the accident. As the street car approached he was 20 feet or more

in arrest of judgment, did not question the sufficiency of the complaint in its answer and did not urge any defect in pleading as a reason in support of its motion for judgment notwithstanding the verdict. *** Furthermore, counsel for appellee and the trial court both treated the complaint as sufficient in this respect inasmuch as the record discloses that the instructions offered by the defendant *** and given by the court, told the jury, not only once but several times, that proof of negligence on the part of plaintiff, as well as of King (the injured employee), was a material allegation of plaintiff's complaint and that unless such allegation was proven by a preponderance of the evidence, the jury should find the defendant not guilty. *** In the Nelson-Paxson case is a fair expression of the law applicable to the circumstances here presented. Defendants do not claim that the complaint as amended, denied the allegations thereof, offered instructions which raised material only questions of fact, filed no motion in arrest of judgment, and in fact never made the contention that a complaint was insufficient until the matter was presented here on appeal. The second principal defense interposed is that plaintiff failed to prove that all of his employees were in the exercise of due care for the safety of Gust v Olson. Upon the record presented there was only one other employee involved, Charles Hebel, the foreman. Defendants insist that since plaintiff seeks to recover under section 7 of the act, he must bring himself within the conditions and requirements of the statute and affirmatively prove that Hebel, as well as Olson, was in the exercise of care for Olson's safety. He has already indicated from an examination of the record that Hebel could not have warned Olson in time to have avoided the accident. As the street car approached he was 30 feet or more

from Olson, with his back turned toward him, and facing to the south. He first became aware of the car because of its lights as it emerged from the viaduct about 40 feet away, and noticed its speed as he began to turn around. Liebal expressed the opinion that the car was going 30 miles an hour up the incline, without sounding any warning, and before he had a chance to turn completely, the car had struck Olson with such force as to hurtle him through the air some 30 or 40 feet into the wooden bridge, which was moved about five feet by the impact, and caused a fracture of almost all the ribs on the right side of Olson's body. Plaintiff's counsel figure that a street car proceeding at the rate of 30 miles an hour, would travel a distance of 40 feet in less than one second. The evidence disclosed that the accident occurred about 40 feet east of the viaduct. Under the circumstances the jury was justified in believing that Liebal had no opportunity to warn Olson in sufficient time to avert the accident.

Defendants rely strongly on O'Brien v. Chicago City Ry. Co., 216 Ill. App. 115, which was subsequently reversed by the Supreme court. The O'Brien case does not indicate that the plaintiff was obliged to account for the action of all his employees, and we know of no case which goes so far as to hold that a plaintiff employer, suing under section 29 of the Act, has the burden of affirmatively proving that everyone of the employees on the job was free from negligence. Conceivably, there may be numerous workmen employed when an accident occurs, and none of the authorities cited and argued holds that a plaintiff employer would have to affirmatively show that all of them were free from negligence in order to recover. Moreover, defendants offered no evidence tending to show that any employee, other than Liebal, was present and in a position to warn Olson. In fact, Liebal and Olson

from Olson, with his back turned toward him, and facing to the north. He first became aware of the car because of its lights as it emerged from the viaduct about 40 feet away, and noticed its speed as he began to turn around. Lihel expressed the opinion that the car was going 30 miles an hour up the incline, without sounding any warning, and before he had a chance to turn completely, the car had struck Olson with such force as to hurl him through the air some 20 or 40 feet into the wooden bridge, which was moved about five feet by the impact, and caused a fracture of almost all the ribs on the right side of Olson's body. Plaintiff's counsel claims that a street car proceeding at the rate of 30 miles an hour, could travel a distance of 40 feet in less than one second. The evidence disclosed that the accident occurred about 10 feet east of the viaduct. Under the circumstances the jury was justified in believing that Lihel had no opportunity to warn Olson in sufficient time to avert the accident.

Defendants rely strongly on Chicago v. Chicago City

1905, 216 Ill. App. 115, which was subsequently reversed by the Supreme Court. The Illinois case does not hold that the plaintiff was obliged to account for the action of all his employees, and we know of no case which goes so far as to hold that a plaintiff employer, under section 29 of the act, has the burden of affirmatively proving that everyone of the employees on the job was free from negligence. Conversely, there may be numerous workmen employed when an accident occurs, and none of the authorities cited and argued holds that a plaintiff employer would have to affirmatively show that all of them were free from negligence in order to recover. Moreover, defendants offered no evidence tending to show that any employee, other than Lihel, was present and in a position to warn Olson. In fact, Lihel and Olson

were the only ones present at the scene of the accident.

In discussing section 29 of the Workmen's Compensation Act, Angerstein, in his work on that subject, states in section 633, page 973, that "The basis of the employer's right to recover against the third party, where all parties are under the act, is that the injury or death of the employee was not proximately caused by the negligence of the employer or his employee, and was caused under circumstances creating a legal liability for damages in the third party. In other words, the question in a proceeding by the employer to recover from the third party is a question whether the injury or death was proximately caused by the employer or his employee. If the injury or death was proximately caused by the negligence of the employer or his employee there could be no recovery from the third party." The immediate question presented in a proceeding by the employer to recover from a third party is whether the injury was proximately caused by the employer or his employee. In determining that question the jury has a right to determine whether any negligence of the plaintiff, which in the instant proceeding would have to be through his agents because plaintiff was not present, proximately caused Olson's injury, or whether Olson's own conduct proximately contributed thereto. That question was answered adversely to defendants.

It is also urged that the verdict of the jury was contrary to the manifest weight of the evidence. It may be conceded that the testimony of the eyewitnesses was conflicting. Plaintiff claims that Olson was working in the ditch immediately to the south of the street car track, that the car approached at an excessive rate of speed without any warning, that the street was well lighted, and that Olson was in the exercise of due care for his own safety. With respect

were the only ones present at the scene of the accident.

In discussing section 1 of the Motor Vehicle Act

and, particularly, in his work on the 1st of the section

and, page 27, that "the words of the section are to be

construed against the party who is liable to be injured

and, in that the injury or damage is not to be

attributed to the negligence of the injured party,

and has caused under circumstances which are

not due to the negligence of the injured party, or

in a proceeding by the injured party to recover

is a question as to whether or not the injury or

damage is due to the negligence of the injured party or

whether it is due to the negligence of the injured party

or his negligence, and the burden of proof is on the

plaintiff. The burden of proof is on the plaintiff

to establish that the injury or damage is due to the

negligence of the defendant, and the burden of proof is

on the plaintiff to establish that the injury or damage

is due to the negligence of the defendant, and the burden

of proof is on the plaintiff to establish that the injury

or damage is due to the negligence of the defendant, and

the burden of proof is on the plaintiff to establish that

the injury or damage is due to the negligence of the

defendant. It is also noted that the verdict of the jury

is contrary to the verdict of the court, and it may be

concluded that the evidence of the jury is not

binding. It is also noted that the verdict of the jury

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binding. It is also noted that the verdict of the jury

is contrary to the verdict of the court, and it may be

to Liebal, it was also a question of fact whether he could have warned Olson in time to avert the accident. Defendants presented the theory that Olson was working several feet to the south of the track and backed into the side of the car as it approached. It was for the jury to weigh the evidence, determine the credibility of the witnesses and decide how the accident happened. Negligence and contributory negligence are measured by the same standard, the failure to exercise ordinary care, and in attempting to prove their respective theories, plaintiff and defendants are both entitled to have the same scales used in weighing the testimony presented. Schmidt v. Anderson, 301 Ill. App. 28; Blumb v. Getz, 366 Ill. 273. Both of these cases, and other decisions which might be cited, hold that the question of proximate cause is one of fact for the jury.

Complaint is made of various instructions given and refused. We have examined the criticism leveled at these instructions, and although we think some of them might have been couched in more appropriate language, they were on the whole fair and free from reversible error.

For the reasons indicated, the judgment of the Circuit court should be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

42634

RAY LANGEN,

Appellant,

v.

MERCHANTS ACCEPTANCE
CORPORATION, a corporation,
Appellee.

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

ON REHEARING.

324 I.A. 228

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

After filing our original opinion in this cause defendant's petition for rehearing was allowed. Plaintiff had appealed from an order of the Circuit court allowing defendant's motion to strike his verified amended complaint, seeking a money decree for grievances alleged to have been committed by defendant in transactions involving a usurious loan and a chattel mortgage foreclosure, and dismissing the cause at plaintiff's costs.

From the allegations of the complaint which are taken to be admitted by the motion to strike it appears that September 11, 1941 plaintiff, who was engaged in the printing business, borrowed from defendant, a finance corporation, the sum of \$8,000, to be repaid within a period of two years as follows: \$225 on the 25th day of October 1941, and a like amount on the 25th day of each and every month thereafter for 23 months, the final payment of \$2,600 falling due September 26, 1943. To evidence the indebtedness plaintiff gave defendant a promissory note for \$8,000 secured by chattel mortgage covering 66 listed items of personal property in his printing establishment. Defendant charged plaintiff 25 per cent as usurious interest for the two-year period, contrary to the statute of the State of Illinois (Ill. Rev. Stat. 1943, ch. 74, par. 4 et seq.), which provides that the maximum interest to be charged on any loan shall not exceed 7 per cent per annum. Plaintiff actually

HAY JUDGE

Allegation

V.

MEMORANDUM
COMMISSIONER, & COMPANY
ALLEGATION

THESE TWO MONTHS

THESE TWO MONTHS

FOR THE PURPOSE OF THE ALLEGATION

After filing our original complaint

complaint's petition for relief from the

appealed from an order of the

and's motion to set aside the

a money decree for the purpose of

by defendant in connection with

another party to the

plaintiff's case

from the

to be admitted by the

in 1941 plaintiff, who was

borrowed from defendant, a

\$8,000, to be repaid within a

on the 15th day of

15th day of each and every

final payment of \$1,000

evidence the indebtedness

note for \$8,000 secured by

items of personal property in

defendant charged plaintiff

the two-year period, contrary

Illinois (Ill. Rev. Stat. 1943, ch. 122, par. 4-122), which

provides that the maximum

shall not exceed 7 per cent

received only \$6,400. For the difference between the amount borrowed and the sum paid, defendant handed plaintiff a check for \$1,600 which he immediately indorsed and returned to the defendant corporation, which retained the proceeds thereof. To circumvent the Illinois statute, which prohibits the charge of interest in excess of 7 per cent per annum, Treger, the secretary, requested plaintiff to sign a purported brokerage agreement between plaintiff and Treger, but defendant concedes that its secretary Treger had no brokerage agreement with plaintiff.

From September 11, 1941 to September 12, 1942 plaintiff paid defendant a total of \$1,263. Under the terms of the loan 11 installments of \$225 each, aggregating \$2,475, should have been paid by plaintiff within the first eleven months. Claiming that there was a default in the payment of the mortgage indebtedness, defendant on September 8, 1942 sent plaintiff a notice of the chattel mortgage foreclosure, advising him that there would be a sale of the chattels on September 12, 1942. Plaintiff claims that some of the chattels foreclosed constituted "mechanic's tools" which, under the provisions of chapter 95, section 24, Ill. Rev. Stat. 1943, could not be foreclosed and sold without court procedure. Nevertheless, no application was made to the court, and all the chattels mortgaged were sold in bulk to Seymour Bernstein, president of the corporation, for the sum of \$5,000, which is alleged to have been a grossly inadequate price.

Although various points were raised as ground for reversal, the principal contention advanced was that plaintiff was entitled to be credited with the \$1,600 deducted as a brokerage charge as "payment" of principal upon the first

received only \$6,400. For the difference between the amount borrowed and the sum paid, defendant handed plaintiff a check for \$1,600 which he immediately informed and returned to the defendant corporation, which retained the proceeds thereof. To circumvent the Illinois statute, which prohibits the charge of interest in excess of 7 per cent per annum, Treger, the secretary, procured plaintiff to sign a purported brokerage agreement between plaintiff and Treger, but defendant contends that the secretary Treger had no brokerage agreement with plaintiff. From September 12, 1941 to September 12, 1942 plaintiff paid defendant a total of \$1,600. Under the terms of the loan 12 installments of \$250 each, aggregating \$3,000, should have been paid by plaintiff within the first eleven months. Claiming that there was a default in the payment of the mortgage indebtedness, defendant on September 3, 1942 sent plaintiff a notice of the chattel mortgage foreclosure, advising him that there would be a sale of the chattels on September 12, 1942. Plaintiff claims that some of the chattels foreclosed constituted "mechanic's tools" which, under the provisions of chapter 95, section 24, Ill. Rev. Stat. 1943, could not be foreclosed and sold without court procedure. Nevertheless, no application was made to the court, and all the chattels mortgaged were sold in bulk to Seymour Bernstein, president of the corporation, for the sum of \$5,000, which is alleged to have been a grossly inadequate price. Although various points were raised as ground for reversal, the principal contention advanced was that plaintiff was entitled to be credited with the \$1,600 deducted as a brokerage charge as "payment" of principal upon the first

maturing installments of the note. If it had been so credited, that sum, together with \$1,263 paid by plaintiff prior to the foreclosure, would have exceeded the aggregate installments of \$2,475 due for the first 11 months prior to the foreclosure, and in that event there would have been no default and no right to foreclose.

Defendant did not seek to escape the obvious conclusion that the devious means employed for setting up a brokerage agreement, through which \$1,600 was deducted from the principal amount borrowed, constituted usury, but relied upon the contention that "a bonus or a commission retained from a loan which is charged with usury goes to reduce the loan as made, rather than to the payment of it afterward." Connor v. Minier et al., 288 Pac. 23 (Cal.), Church v. Maloy et al., 70 New York 63, and the two cases of Gilbert v. Fosston Mfg. Co. et al., 216 N. W. 778, and 218 N. W. 451 (both decided in Minnesota), were cited and relied upon as supporting that contention. In other words, its counsel sought to distinguish between a "payment" and a "withheld commission," and in its petition for rehearing furnished additional authorities purporting to sustain its contention. Its counsel admits that no such distinction can be found in any Illinois decisions.

In our original opinion we held that the \$1,600 deducted from the \$8,000 borrowed constituted payment on account of the principal indebtedness and should have been credited to the first maturing installments of the note; that if it had been so credited, that sum, together with \$1,263 paid by plaintiff prior to the foreclosure, would have exceeded the aggregate installments of \$2,475 due for the first eleven months prior to the foreclosure; and in such event there would have been no default and no right to foreclose.

maturing installments of the note. If it had been so credited, that sum, together with \$1,263 paid by plaintiff prior to the foreclosure, would have exceeded the aggregate installments of \$2,475 due for the first 11 months prior to the foreclosure, and in that event there would have been no default and no right to foreclose.

Defendant did not seek to escape the obvious conclusion that the various means employed for setting up a brokerage agreement, through which \$1,500 was deducted from the principal amount borrowed, constituted usury, but relied upon the contention that "a bonus or a commission retained from a loan which is charged with usury does not reduce the loan as made, rather than to the payment of it afterwards." Gordon v. Winter et al., 155 Cal. 23 (Cal.), Quinn v. Welby et al., 70 New York 63, and the two cases of Alford v. Fosston, 116 Cal. 216, 218, and 219, and Alford v. Fosston, 116 Cal. 216, 218, and 219 (both decided in Minnesota), were cited and relied upon as supporting that contention. In other words, its counsel sought to distinguish between a "payment" and a "withheld commission," and in its petition for rehearing furnished additional authorities purporting to sustain its contention. Its counsel admits that no such distinction can be found in any Illinois decisions.

In our original opinion we held that the \$1,500 deducted from the \$8,000 borrowed constituted payment on account of the principal indebtedness and should have been credited to the first maturing installments of the note; that if it had been so credited, that sum, together with \$1,263 paid by plaintiff prior to the foreclosure, would have exceeded the aggregate installments of \$2,475 due for the first eleven months prior to the foreclosure; and in such event there would have been no default and no right to foreclose.

The admitted facts in the case at bar do not support the argument that the \$1,600 item was a withheld commission. If it had been such the \$1,600 check would not have come into existence at all. Defendant would have merely given plaintiff the sum of \$6,400 after deducting the usurious commission, and thus consummated the transaction. Under the ingenious plan devised by defendant, plaintiff received the sum of \$6,400, plus a check for \$1,600, making up the total of \$8,000 which he borrowed. Thereafter when plaintiff indorsed the check for \$1,600 and turned it over to defendant, it constituted a "payment" of that amount.

As indicated in our original opinion, courts have repeatedly pointed out that the shifts and devices to evade the statutes against usury have taken every shape and form that the wit of man can devise, but none have been allowed to prevail. Effect has always been given to the true intent of the parties. In the instant proceeding defendant chose to devise a plan by the exchange of the \$1,600 check which stamps it as a payment, and we would not be warranted, nor are we disposed, to so construe it as to make it appear to have been a withheld commission. The sum of \$1,600 was in fact not withheld but was delivered to plaintiff and by him paid to defendant.

Plaintiff's counsel points out that the subterfuge that was used by the defendant in the case at bar, bold as it seems, is not novel to the courts of Illinois, and cites several cases in which similar schemes have had the consideration of our courts. In the early case of Payne v. Newcomb, 100 Ill. 611, a loan of money was made through an agent for the highest legal rate of interest. Pursuant to an arrangement between the lender and the agent, the agent was to impose upon the borrower a charge for his services in examining the

title to the property given in security and assessing its value. The agent deducted from the sum lent a commission of 5 per cent and a further commission of 2-1/2 per cent for procuring an extension in payment of the indebtedness. The court held that the exaction and payment of such commissions rendered the loan usurious, and that such usurious interest could be deducted from or set off against the remaining principal.

Not long thereafter, in Meers v. Stevens, 106 Ill. 549, a lender advanced money through his son as his agent, who exacted 4 per cent of the principal as commission, taking a note for the entire loan bearing 10 per cent interest payable in one year. At the end of the year, on application for an extension of time, the lender referred the debtor to the son, who made the extension upon payment of \$100, and at the end of the second year, another extension was made on the same terms. Both the Appellate and Supreme court held that the 4 per cent which was taken as commission, and the payments exacted for the extension on the indebtedness, rendered the transaction usurious, and that the money ought to be credited as payments on the note.

In Fowler v. Equitable Trust Company, 141 U. S. 384, the United States Supreme court had occasion to consider the question of usury under the Illinois law. A New York corporation, through one of its local agents in Illinois, negotiated a loan of money to a citizen of Illinois at the highest rate allowed under our statute. The agent charged the borrower, in addition thereto, commissions for his services pursuant to a general arrangement made with the New York company at the time he became agent. The court reviewed practically all the Illinois cases on the subject, including those heretofore discussed, and in reliance on these decisions, held

that such a loan was usurious under the laws of this state, that the lender could recover only the principal sum diminished by applying as credits thereof all payments made on account of interest, and that in such cases whatever the borrower pays on account of the loan must go as credit on the principal sum. "In such a case the borrower, being sued, may have all payments made by him on account of interest applied in diminution of such part of the principal as remains unpaid. Harris v. Bressler, 119 Illinois 467, 472; Payne v. Newcomb, 100 Illinois 611, 623; Hamill v. Mason, 51 Illinois 488; Heffner v. Vandolah, 62 Illinois 483, 486; Saylor v. Daniels, 37 Illinois 331; Mitchell v. Lyman, 77 Illinois 525. Such is the uniform construction of the statute, which, in the case of usury in a loan, forfeits the whole of the interest contracted to be received, and permits a recovery only for the principal sum due. As there is no interest really due, if the transaction be usurious - the right to recover interest being forfeited at the moment the contract of loan is consummated - whatever the borrower pays on account of the loan must go as credit on the principal sum; otherwise, the usurer would get the benefit of his illegal contract, and the statute be rendered inoperative."

Defendant concedes that the \$1,600 deducted from the \$8,000 borrowed was usurious and "is in agreement that the said sum of \$1,600 must be credited to the reduction of the loan," but it takes the position that this payment should not be credited to the first maturing installments of the note. So far as we can determine, the contention seems to be that the \$1,600 should not be deducted until the transaction had been consummated, presumably after plaintiff had made all the monthly installments for which

he had contracted. None of the Illinois cases so holds, and as pointed out in the Fowler case, "whatever the borrower pays on account of the loan must go as credit on the principal sum; otherwise, the usurer would get the benefit of his illegal contract, and the statute be rendered inoperative."

In one of the cases cited by defendant (Gilbert v. Fosston Mfg. Co., et al., 216 N. W. 778 (Minn.)), the court recognized the fact that the loans there under consideration were subject to the Illinois statutes and declared them usurious to the extent that more than interest at 7 per cent per annum had been taken. Two loans were involved in that transaction, one for \$30,000, upon which a commission or bonus of \$4,650 was charged, and another loan of \$14,000, from which was deducted \$2,030 as commission. Both of these bonuses or commissions were in addition to the interest at the maximum rate of 7 per cent. The sale of the bonds in that proceeding was on the theory, as the court pointed out, that the notes they secured were enforceable for par value, but this theory was held to be erroneous, and the amount claimed to be due excessive accordingly. In discussing that phase of the case the court said: "It may be that, if, as of the date of the sale, the borrower had been given the credit to which he was entitled because of his payment of the usurious commissions, or if the original principal of the loans had been computed at the correct amount (face of the notes less the usurious bonuses) and the proper credit given for subsequent payments, there would have been, at the date of the sale, no default and therefore no right to sell the collateral." But it was held that that issue was not before the court, and would be the subject matter of a new trial. However, we think the principle which is there enunciated, although dicta, correctly states the method of computing usurious payments, and when applied to the proceedings at bar, entitled plaintiff to a

in fact contested. None of the Illinois cases, and
as pointed out in the Foran case, "the fact that the
on account of the fact that it is a matter of
otherwise, the manner would be the same as in the
contest, and the matter be decided in the same
In one of the cases cited by the court in the
Boston, Mass., case, the court held that the
recognized the fact that the court in the
were subject to the Illinois statute in the same
to the extent of the Illinois statute, and the
had been taken, the court held that the
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there, the court held that the
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loans had been computed as the correct amount of the notes
less the various payments, and the court held that the
separate payments, there would have been, at the date of the sale,
no deficit and therefore no right to sell the collateral." But
it was held that that issue was not before the court, and would
be the subject matter of a new trial. However, we think the
principle which is there enunciated, although slightly, correctly
states the method of computing various payments, and when
applied to the proceedings at hand, entitled plaintiff to a

credit of \$1,600 on the principal in determining whether or not the mortgage indebtedness was in default. Given that credit, the \$1,600, together with \$1,263 which he had actually paid, aggregated more than the amount which was due on the chattel mortgage before it was foreclosed, and therefore there was no default and consequently no right to foreclose. The \$1,600, although in the possession of defendant, in equity and good conscience belonged to plaintiff. The money was there to meet the first payments that fell due and it should have been so applied. To hold with defendant, would in effect permit it to evade and circumvent the usury statute.

Accordingly we adhere to our original opinion, reversing the order of the Circuit court allowing defendant's motion to strike the amended complaint and dismissing the suit, and remanding the cause with directions to overrule the motion, order defendant to answer, and for a trial upon the merits.

ORDER REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Scanlan, J., concur.

-8-

credit of \$1,000 on the principal in determining whether or
 not the mortgage indebtedness was in default. It was first
 credit, the \$1,000, together with \$1,200, which he had actually
 paid, aggregated more than the amount which was due on the
 original mortgage before it was foreclosed, and therefore
 there was no default and consequently no right to foreclose.
 The \$1,000, although in the possession of the bank, in equity
 and good conscience belongs to plaintiff. The bank is
 there to hold the first mortgage and the \$1,000 is a credit
 have been so applied. To hold with plaintiff, it has an effect
 permit it to make and enforce the first mortgage.

Accordingly, it is ordered that the first mortgage, reversing
 the order of the circuit court insofar as it relates to
 stating the amount of the first mortgage, and re-
 maining the same with directions to overrule the motion,
 order defendant to answer, and for a trial on the merits.

WILLIAM J. HILL, JR.,
 COUNSEL FOR PLAINTIFF.

WILLIAM J. HILL, JR., and J. J. HILL, JR.,
 COUNSEL FOR DEFENDANT.

42217

THE TRUST COMPANY OF CHICAGO,
a Corporation, as Administra-
tor of the Estate of Alfonso
Desiderio, Deceased,
Appellee,

v.

PUBLIC SERVICE COMPANY OF
NORTHERN ILLINOIS, a Corporation,
Appellant.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

32-11-228

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

UPON THE PETITION FOR REHEARING.

On February 3, 1941, this cause was upon a calendar called the "No Progress Calendar" and on that date Judge Epstein entered the following order: "On Order of Court it is ordered that the above entitled suit be and the same is hereby dismissed for want of prosecution without costs." On May 6, 1941, plaintiff filed a verified petition under Section 72 of the Civil Practice Act to vacate the order of February 3, 1941. On May 23, 1941, defendant filed a verified answer to plaintiff's petition. No replication to the answer was filed by plaintiff. On January 12, 1942, Judge Prystalski entered the following order in the cause:

"This Cause Coming On To Be Heard on motion of Samuel J. Andalman, attorney for the Plaintiff, and the Court having the written motion of the plaintiff and the petition of the plaintiff heretofore filed on, to-wit, May 6, 1941, in the nature of a substitute for the writ of error coram nobis, and the sworn answer of the defendant filed May 25, 1941, to said motion and petition of the plaintiff, and both sides being now represented in open Court and the Court being fully advised in the premises, without any oral evidence offered or received

"The Court Finds:

THE TRUST COMPANY OF CHICAGO,
a corporation, as administrator
for the Estate of Alfonso
Desiderio, Deceased,

Appellee,

v.

MURKIN SERVICE COMPANY OF
NORTHWEST TERRITORIES, a corporation,
Appellant.

MR. JUSTICE SCHEPHERD delivered the following opinion:

FROM THE WRITING FOR REHEARING.

On February 3, 1941, this case was upon a calendar

called the "No Progress Calendar" and on that date Judge

Hepburn entered the following order: "On order of Court

it is ordered that the above entitled suit be and the same is

herby dismissed for want of prosecution without costs." On

May 6, 1941, Plaintiff filed a verified petition under Section

72 of the Civil Practice Act to vacate the order of February 3,

1941. On May 23, 1941, Defendant filed a verified answer to

Plaintiff's petition. No replication to the answer was filed

by Plaintiff. On January 12, 1942, Judge Hepburn entered

the following order in the case:

"This case coming on to be heard on motion of Samuel

J. Anselman, attorney for the Plaintiff, and the Court having

the written motion of the Plaintiff and the petition of the

Plaintiff heretofore filed on, to-wit, May 6, 1941, in the

nature of a substitute for the writ of error coram nobis, and

the sworn answer of the Defendant filed May 23, 1941, to said

motion and petition of the Plaintiff, and both sides being now

represented in open Court and the Court being fully advised in

the premises, without any oral evidence offered or received

"The Court finds:

"That the allegations of the plaintiff's petition are true.

"It Is Therefore Ordered that the said motion and petition of the plaintiff is hereby allowed and granted, and It Is Further Ordered that the order entered on February 3, 1941, dismissing this cause be and the same is hereby vacated and set aside and held for naught." Defendant appealed from that order.

On February 10, 1944, we filed an opinion in this cause sustaining the judgment of the trial court. Thereafter defendant filed a petition for rehearing, which we allowed.

Plaintiff's verified petition to vacate the judgment of February 3, 1941, recites:

"Now comes the plaintiff, The Trust Company of Chicago, an Illinois corporation, Administrator of the Estate of Alfonso Desiderio, deceased, and respectfully petitions the Court to set aside and vacate the order entered in this cause by His Honor, Judge Benjamin P. Epstein, on February 3, 1941, whereby through inadvertence and oversight, this Court ordered the dismissal of the above entitled cause, and petitioner respectfully represents the following:

"1. That previous to October 11, 1940, this cause was placed upon what this Court calls the 'No Progress Call' for the purpose of procuring further progress in this cause to the end that it would be disposed of.

"2. That your petitioner respectfully represents that it responded to said call and represented to the Court that there was pending in this cause the defendant's motion to strike the complaint and that thereupon the cause was continued to November 12, 1940, on said call, to permit further progress to be made in the cause, and with the distinct understanding that when such further progress was made, that the case would be taken off the 'No Progress Call.'

What the allegations of the Plaintiff's petition are

true.

"It is therefore alleged that the Plaintiff's petition is
false and that the Plaintiff is guilty of fraud in filing the same.
Further, it is alleged that the Plaintiff has caused the Court to
waste its time and money in hearing and deciding upon the same.
The Plaintiff is held for contempt for having caused the Court to
waste its time and money in hearing and deciding upon the same.
On February 1, 1940, the Plaintiff filed a petition for
enforcement of the judgment of the Court, wherein the Plaintiff
alleged that the Defendant had failed to comply with the judgment
of the Court, and that the Plaintiff was entitled to enforcement
of the same. The Court, on February 1, 1940, granted the Plaintiff's
petition and ordered the Defendant to comply with the judgment of
the Court within a certain time. The Defendant, however, failed to
comply with the Court's order, and the Plaintiff is now seeking
enforcement of the same.

February 1, 1940, further:

"Now comes the Plaintiff, The First Company of Illinois,
an Illinois corporation, and assigns to the Plaintiff of Illinois
Desiderio, deceased, an Illinois citizen, the right to sue the
Defendant, deceased, in the County of Cook, Illinois, for the
same. The Plaintiff alleges that the Defendant, deceased, was
indebted to the Plaintiff at the time of his death, and that the
Plaintiff is entitled to recover the amount of the debt from the
estate of the Defendant. The Plaintiff further alleges that the
Defendant, deceased, was insolvent at the time of his death, and
that the Plaintiff is entitled to recover the amount of the debt
from the assets of the Defendant's estate. The Plaintiff seeks
judgment for the amount of the debt, with interest thereon from
the date of the Defendant's death until payment in full, and
costs of suit. The Plaintiff further seeks judgment for the
amount of the debt, with interest thereon from the date of the
Defendant's death until payment in full, and costs of suit.

the following:

"1. That provision to enforce the judgment of the Court
made upon what this Court calls the two previous bills for the
purpose of procuring further progress in this case to the end
that it could be disposed of.

"2. That your petition respectfully represents that
it responded to said call and represented to the Court that the
same was pending in this cause the Defendant's motion to strike the
complaint and that thereafter the same was continued to November
12, 1940, on said call, to permit further progress to be made in
the cause, and with the distinct understanding that when such
further progress was made, that the case would be taken off the

"3. That thereafter, on October 11, 1940, an argument was had before Judge Harry M. Fisher of this Court, with reference to the sufficiency of the statement of claim and an order was entered on said date sustaining defendant's motion to strike the complaint and granting the plaintiff leave to file an amended complaint and entering a rule for the defendant to plead to the amended complaint twenty days after the filing of same.

"4. That thereupon an amended complaint was filed by the plaintiff on October 30, 1940 and on November 18, 1940, the defendant filed another motion to strike the amended complaint.

"5. That the plaintiff, on the 28th day of April, 1941, served notice on the defendant to the effect that on May 1, 1941, an order would be asked in the above entitled cause overruling the defendant's motion to strike the complaint; that thereupon, on said May 1, 1941, your petitioner learned for the first time that an order had been entered by His Honor, Judge Benjamin F. Epstein, on February 3, 1941, dismissing this cause for want of prosecution on the so-called 'No Progress Call.'

"6. That no notice of any kind was served upon your petitioner or its attorney that this cause would appear on the so-called 'No Progress Call' on February 3, 1941 and your petitioner and its attorney had no knowledge of the same and were under the impression and belief that on November 12, 1940, when said cause was to come up as aforesaid, the same would be taken from the said 'No Progress Call' because of the progress that had been made in and about the entry of the orders before said Judge Fisher, hereinabove referred to, and the other activity in the case.

"7. That if His Honor, Judge Epstein, had been advised of the progress that had actually been made, as shown by the record in this cause, the said order of February 3, 1941, dismissing said cause, would not have been entered and, therefore,

"3. That thereafter, on October 11, 1940, an argument was held before Judge Henry M. Fisher of this Court, with reference to the sufficiency of the statement of claim and an order was entered on said date sustaining defendant's motion to strike the complaint and granting the plaintiff leave to file an amended complaint and entering a rule for the defendant to plead to the amended complaint twenty days after the filing of same.

"4. That thereupon an amended complaint was filed by the plaintiff on October 10, 1941, and on November 13, 1941, the defendant filed another motion to strike the amended complaint.

"5. That the plaintiff, on the 15th day of April, 1941, served notice on the defendant to the effect that on May 1, 1941, an order would be asked in the above entitled cause overruling the defendant's motion to strike the complaint; that thereupon on said May 1, 1941, your petitioner appeared for the first time that an order had been entered by the Court, Judge Benjamin F. Epstein, on February 3, 1941, dismissing this case for want of prosecution on the so-called 'No Progress Call'.

"6. That no notice of any kind was served upon your petitioner or its attorney that this case would appear on the so-called 'No Progress Call' on February 3, 1941 and your petitioner and its attorney had no knowledge of the same and were under the impression and belief that on November 13, 1940, when said case was to come up as aforesaid, the same would be taken from the said 'No Progress Call' because of the progress that had been made in and about the entry of the orders before said Judge Fisher, heretofore referred to, and the other activity in the case.

"7. That if His Honor, Judge Epstein, had been advised of the progress that had actually been made, as shown by the record in this case, the said order of February 3, 1941, dis-

your petitioner states that the order of February 3, 1941, dismissing this cause, was entered through oversight and inadvertence on the part of the Court.

"8. That this cause has never been noticed for trial or placed upon the trial call because the issues have not yet been joined.

"9. That this Court was without jurisdiction to enter an order on February 3, 1941, dismissing said cause.

"Wherefore Your Petitioner Prays that an order be entered herein vacating and setting aside the said order entered on February 3, 1941."

The following are the salient parts of defendant's verified answer to plaintiff's petition: It denies that there was any understanding of any kind that the cause would be taken off of the No Progress Call when the case was called on October 7, 1940; alleges that the cause appeared on the No Progress Call on November 12, 1940, pursuant to the continuance order of October 7, 1940; that on November 12 the cause was called and continued to December 9, 1940, on which date it was continued to February 3, 1941, on which last date the cause was called and dismissed; that timely notice of each of the calls and continuances was published in the Chicago Daily Law Bulletin pursuant to Rule 25 of the Circuit court; that plaintiff and its counsel were bound to take notice of said calls, continuances, and the dismissal order; that by the exercise of ordinary care and diligence plaintiff should have known of all said calls, continuances and the dismissal order, and that any failure in that regard was necessarily due to a lack of care and diligence; that plaintiff knew or should have known that the cause was not taken off of said No Progress Call on November 12, 1940, nor at any time; denies that plaintiff or its counsel had any basis whatever for any impression or belief that the cause would be or had been taken off said No Progress

-4-

your petition states that the order of February 2, 1941, was missing this case, was entered through oversight in the investigation on the part of the Court.

"8. That this case was never been noticed for trial or placed upon the trial call and it is shown that it has not been joined.

"9. That this case was not noticed for trial until after an order on February 2, 1941, in the same case.

"Wherefore your petitioners pray that the Court will order herein vacating and setting aside the said order entered on February 2, 1941."

The following are the facts of the case as set forth in the petition to plaintiff's petition: The order of February 2, 1941, was signed by the Court in the case of No. 12, 1940, on November 12, 1940, and the case was entered on the trial call on November 12, 1940, pursuant to the continuance order of October 1, 1940.

That on November 12, 1940, the case was called and continued to be called on November 12, 1940, on which date it was continued to February 2, 1941, on which last date the case was called and dismissed; that the notice of each of the calls and continuances was furnished in the Chicago Daily News Collection pursuant to Rule 2 of the Court's Court; that plaintiff and his counsel were bound to take notice of said calls, continuances, and the dismissal order; that by the exercise of ordinary care and diligence plaintiff should have known of all said calls, continuances and the dismissal order.

and that any failure in that regard was necessarily due to a lack of care and diligence; that plaintiff knew or should have known that the case was not taken off of said No. 12, 1940, on November 12, 1940, nor at any time; hence that plaintiff or its counsel had any basis whatever for any impression or belief that the case would be or had been taken off said No. 12, 1940.

Call prior to or after February 3, 1941; denies each and every allegation of fact stated in paragraph 7 of the petition; denies that the cause was dismissed through any oversight or inadvertence on the part of the court; states that the cause was placed upon the so-called "No Progress" calendar and upon Judge Epstein's call pursuant to the provisions of section 5 of Rule 22 of the Circuit court, and was called by Judge Epstein at the several times above mentioned pursuant to the provisions of said rule; denies that the court was without jurisdiction to enter the order of February 3, 1941; alleges that prior to and continuously since the filing of the complaint there was in full force and effect Rule 22 and section 5 thereof, which provides, inter alia, for the preparation of calendars of cases "in which no action has been taken within one year," and the assignment of such calendars for disposition; that the instant cause was placed upon such a calendar and also appeared upon Judge Epstein's "No Progress Call" for Monday, October 7, 1940, at 10 a.m.; that prior to and continuously since the filing of the complaint Rule 25 of the Circuit court has been in full force and effect, which rule pertains to "Notice of Calls" and provides:

"Sec. 1. Parties shall take notice of all calls of the trial calendar as well as of all other calendars and lists provided for in these Rules.

"Sec. 2. Unless otherwise directed by the Executive Committee, notice of all calls shall be published in the Chicago Daily Law Bulletin not later than in its issue for the day on which the call is to be had."

The answer further alleges that plaintiff's attorney, pursuant to announcements appearing in the Bulletin, responded to the call before Judge Epstein on October 7, 1940, and the cause was at that time continued to November 12, 1940; that the announcements for the November 12, 1940, call appeared in the

Call prior to or after February 1, 1941; denies each and every allegation of fact stated in paragraph 7 of the petition; denies that the cause was dismissed through a conspiracy or an overreaching on the part of the court; states that the cause was placed upon the so-called "no progress" calendar and then Judge Hspstein's call pursuant to the provisions of section 12 of Rule 22 of the Circuit Court, and was called by Judge Hspstein at the several times above mentioned pursuant to the provisions of said rule; denies that the court was without jurisdiction to enter the order of February 1, 1941; alleges that prior to and continuously since the filing of the complaint there was in full force and effect Rule 22 and section 12 thereof, which provides, in part, for the preparation of calendars of cases "in which no action has been taken within one year," and the assignment of such a calendar for disposition; that the instant cause was placed upon such a calendar and also appeared upon Judge Hspstein's "no progress call" for Monday, October 7, 1940, at 10 a.m.; that prior to and continuously since the filing of the complaint Rule 22 of the Circuit Court has been in full force and effect, which rule pertaining to "Notice of Call" and provides:

"Sec. 1. Parties shall take notice of all calls of the trial calendar as well as of all other calendars and lists provided for in these Rules.

"Sec. 2. Unless otherwise directed by the Executive Committee, notice of all calls shall be published in the Chicago Daily News Bulletin not later than in its issue for the day on which the call is to be had."

The answer further alleges that plaintiff's attorney, pursuant to announcements appearing in the Bulletin, responded to the call before Judge Hspstein on October 7, 1940, and the cause was at that time continued to November 12, 1940; that the

Bulletin; that the cause was accordingly called by Judge Epstein on November 12 but that neither plaintiff nor its attorney responded to the call on November 12 and the cause was continued to December 9, 1940, and a notice of the continuance appeared among the orders of Judge Epstein in the November 12, 1940, issue of the Bulletin; that the December 9 call and the order of continuance to February 3, 1941, appeared in the Bulletin announcements; that "thereafter there appeared in the January 30 and 31, 1941, and February 1, 1941, issues of said Chicago Daily Law Bulletin announcements that said cause would appear on the 'No Progress Call' of Judge Epstein on Monday, February 3, 1941; that said cause did appear on said call of Judge Epstein on February 3, 1941, and, upon the call of the same, was dismissed; that there appeared in the February 3, 1941, issue of said Chicago Daily Law Bulletin, among the orders entered by Judge Epstein, an announcement that said cause was dismissed;" that neither plaintiff nor its attorney attended any of the aforesaid calls of the "No Progress" calendar except the call on October 7, 1940; that plaintiff failed and neglected to respond to any of the subsequent calls of the cause or the continuances; that plaintiff never made any attempt to have the cause removed from the "No Progress Call;" denies that the dismissal of the cause resulted from any mistake of fact on the part of the court and denies that plaintiff is entitled to the relief prayed for in its petition and motion or any part thereof, and the answer prays that plaintiff's said petition and motion be denied.

Section 5 of Rule 22 of the Circuit court of Cook county provides:

"Sec. 5. From time to time, the Executive Committee shall cause the Clerk of the Court to prepare separate law and chancery calendars of all cases in which no action has been

taken within one year and assign such calendars to one or more judges for disposition. When called on any such calendar, the cases listed thereon shall be called for trial. If the plaintiff is not ready for trial, the cause, except as hereinafter stated, shall be dismissed for want of prosecution. No continuance shall be granted at the instance of the plaintiff, but for good cause shown, the case may be passed under Rule 26. Any order of dismissal entered in pursuance hereof, may be vacated and the cause reinstated, at any time within thirty days from the date of such order, for good cause shown, upon motion and upon such reasonable terms as to costs and otherwise as the Court may deem proper in the circumstances."

In our reconsideration of this appeal we have reached the conclusion that it is only necessary for us to consider two of the points raised by defendant in support of its contention that the order of January 12, 1942, vacating the order of dismissal should be reversed. Defendant, after calling attention to the fact that the order entered by Judge Prystalski on January 12, 1942, recites that the court heard the matter upon the petition and answer without hearing any oral evidence, contends that as plaintiff filed no replication to defendant's verified answer the affirmative allegations of defendant's answer were not denied by plaintiff and stand admitted. In support of this contention defendant cites Section 32 of the Civil Practice Act, which provides that "when new matter by way of defense or counterclaim is pleaded in the answer, a reply shall be filed by the plaintiff;" and paragraphs (1) and (2) of Section 40 of the Act, that "every answer and subsequent pleading shall contain an explicit admission or denial of each allegation of the pleading to which it relates," and "every allegation, except allegations of damages, not explicitly denied shall be deemed to be admitted." Defendant insists that under the said sections and uniform inter-

taken within one year and such claim to one or more
judges for disposition. When called on by such claimant, the
cases listed therein shall be called for trial. If the plaintiff
is not ready for trial, the cause, except as hereinafter stated,
shall be dismissed for want of prosecution. No costs shall
be granted at the instance of the plaintiff, but if good cause
shown, the case may be passed under the order of the
court entered in favor of the plaintiff, and the case
reinstated, and any costs within thirty days from the date of such
order, for good cause shown, upon motion and upon such reasonable
terms as to costs and otherwise as the court may deem proper in
the circumstances."

In our recent opinion of this case, we have
the conclusion that it is only necessary for us to consider two
of the points raised by defendant in support of his contention
that the order of January 12, 1942, is void. The first of these
points should be reversed, and the second should be affirmed.
to the fact that the order entered by Judge Woodhull on
January 12, 1942, recites that the court heard the matter upon
the petition and answer filed in the case, and that the court
found that as plaintiff filed no reply to the defendant's
verified answer the affirmative allegations of the defendant's answer
were not denied by plaintiff and stand admitted. In support of
this contention defendant cites section 11 of the Civil Practice
Act, which provides that "when new matter is pleaded in answer or
counterclaim it is placed in the answer, and shall be filed by
the plaintiff;" and paragraphs (1) and (2) of section 40 of the
Act, that "every answer and subsequent pleading shall contain an
explicit admission or denial of each allegation of the pleading
to which it relates," and "every allegation, except allegations
of damages, not explicitly denied shall be deemed to be admitted."

pretation of the sections by the courts the affirmative allegations of its answer must be taken as true. It is only necessary to refer to one of the cases cited by defendant in support of its contention: In Watt v. Cecil, 368 Ill. 510, 516, 517, the opinion states:

"No replication was filed to the answer, and no testimony was heard on the usury issue. Prior to filing of either of appellant's answers, on motion of three of the complainants, an order was entered that the Civil Practice act should apply and govern the case. Section 32 of that act (Ill. Rev. Stat. 1937, chap. 110, par. 156) provides in part: 'When new matter by way of defense or counterclaim is pleaded in the answer, a reply shall be filed by the plaintiff.' Section 40 (par. 164) provides: '(1) General issues shall not be employed, and every answer and subsequent pleading shall contain an explicit admission or denial of each allegation of the pleading to which it relates. (2) Every allegation, except allegations of damages, not explicitly denied shall be deemed to be admitted, unless the party shall state in his pleading that he has no knowledge thereof sufficient to form a belief, and shall attach an affidavit of the truth of such statement of want of knowledge, or unless the party has had no opportunity to deny.'" The opinion also states that where in a case no replication is filed but the parties each take testimony on the issues raised in the answer the filing of a replication is waived. But the court held that as no testimony was taken in that case upon the issue of usury, the exception to the general rule did not apply. The same situation is presented in the instant case.

Defendant strenuously contends that it is the established law of this State that Section 72 is not intended to relieve a party from the consequences of his own negligence and that the negligence of plaintiff's counsel is chargeable to plaintiff. That this contention states the law correctly, see Cramer v.

Commercial Men's Ass'n, 260 Ill. 516; Loew v. Krauspe, 320 Ill. 244; McCord v. Briggs & Turivas, 338 Ill. 158; People v. Bruno, 346 Ill. 449; Consolidated Coal Co. v. Oeltjen, 189 Ill. 85.

Defendant argues that its answer apprised plaintiff's counsel that he was charged with negligence in the premises and sets up in detail the facts supporting the charge, and that the counsel did not see fit to deny the charge nor the facts alleged in support of it. It is our unpleasant duty to hold that the position in which plaintiff found itself by the order of February 3 was due to the gross negligence of its counsel. Upon the record we have a case where an able, experienced trial lawyer paid no attention to the "No Progress Call" of Judge Epstein after October 7, 1940. He ignored or failed to notice thereafter the announcements made in the Bulletin that referred to said Call and the instant case; the announcement in the Bulletin of December 9, continuing this cause until February 3, 1941; and the announcements in the Bulletin of January 30, 31, and February 1, that this cause would appear on the No Progress Call of Judge Epstein on Monday, February 3, 1941. That he failed to appear in court on that date he admits. He failed to notice in the Bulletin of February 3 an announcement that this cause had been dismissed for want of prosecution on that date and he did not learn of the dismissal order until May 1, 1941. Counsel, realizing, apparently, the effect of his failure to file a replication, states, in plaintiff's brief, that there was no occasion for him to follow up the publications in the Law Bulletin and to answer calls appearing therein because it was the duty of the clerk to advise the court of the condition of the record, and that if the clerk had advised the court of the condition of the record the case would have been automatically taken off the "No Progress Call;" that when the case was called by Judge Epstein on February 3,

1941, the clerk should have informed the court that on October 11, 1940, Judge Fisher entered an order sustaining defendant's motion to strike the complaint and requiring an amended complaint to be filed within twenty days; that on October 30, 1940, an amended complaint was filed, and that on November 18, 1940, defendant filed a motion to strike the amended complaint. Counsel, in plaintiff's brief, not only charges the clerk with negligence in failing to apprise Judge Epstein of the state of the record but he also intimates that defendant's counsel failed to advise the court on February 3 of the progress that had been made in the case, and that such failure constituted a fraud upon the court. What the counsel now claims as to the conduct of the clerk and defendant's counsel is clearly an afterthought, as the petition to vacate the dismissal order contains no charge of any fault on the part of the clerk, nor does it allege any fraud on the part of defendant's counsel.

In response to plaintiff's allegation in its petition that when the case was continued until November 12, 1940, it was continued on said call "to permit further progress to be made in the cause, and with the distinct understanding that when such further progress was made, that the case would be taken off the 'No Progress Call,'" defendant alleges in its answer that plaintiff knew or should have known that the cause was not taken off of said No Progress Call on November 12, 1940, nor at any time, and denies "that plaintiff or its counsel had any basis whatever for any impression or belief that said cause would be or had been taken off said 'No Progress Call' prior to or after the dismissal thereof on February 3, 1941." As plaintiff offered no proof in support of its allegation it must be disregarded.

We are forced to the conclusion that, upon the record before us, the trial court erred in entering the order of

1941, the clerk should have informed the court that on October 11, 1940, Judge Fisher entered an order sustaining defendant's motion to strike the complaint and requiring an amended complaint to be filed within twenty days; that on October 30, 1940, an amended complaint was filed, and that on November 12, 1940, defendant filed a motion to strike the amended complaint. Counsel, in plaintiff's brief, not only charges the clerk with negligence in failing to advise Judge Heston of the state of the record but he also intimates that defendant's counsel failed to advise the court on February 3 of the progress that had been made in the case, and that such failure constituted a fraud upon the court. What the counsel now claims as to the conduct of the clerk and defendant's counsel is clearly an afterthought, as the petition to vacate the dismissal order contains no charge of any fault on the part of the clerk, nor does it allege any fraud on the part of defendant's counsel.

In response to plaintiff's allegation in its petition that when the case was continued until November 12, 1940, it was continued on said call "to permit further progress to be made in the case, and with the distinct understanding that when such further progress was made, that the case would be taken off the 'No Progress Call,'" defendant alleges in its answer that plaintiff knew or should have known that the case was not taken off of said No Progress Call on November 12, 1940, nor at any time, and denies "that plaintiff or its counsel had any basis whatever for any impression or belief that said case would be or had been taken off said 'No Progress Call' prior to or after the dismissal thereof on February 3, 1941." As plaintiff offered no proof in support of its allegation it must be disregarded.

We are forced to the conclusion that, upon the record before us, the trial court erred in entering the order of

-11-

January 12, 1942, vacating the order of February 3, 1941, and the judgment order of the Circuit court of Cook county of January 12, 1942, is reversed.

JUDGMENT ORDER OF JANUARY 12, 1942,
REVERSED.

Sullivan, P. J., and Friend, J., concur.

January 12, 1942, vacating the order of February 3, 1941,
and the judgment order of the Circuit Court of Cook County
of January 12, 1942, is reversed.
JUDGMENT ORDER OF JANUARY 12, 1942,
REVERSED.

Sullivan, J., and Friend, J., concur.

42217

THE TRUST COMPANY OF CHICAGO,
a Corporation, as Administra-
tor of the Estate of Alfonso
Desiderio, Deceased,
Appellee,

v.

PUBLIC SERVICE COMPANY OF
NORTHERN ILLINOIS, a Corpora-
tion,

Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

32414 228³

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On February 3, 1941, the aforesaid cause was upon a calendar called the "No Progress" calendar and on that date Judge Epstein entered the following order: "On Order of Court it is ordered that the above entitled suit be and the same is hereby dismissed for want of prosecution without costs." On May 6, 1941, plaintiff filed a verified petition under Section 72 of the Civil Practice Act to vacate the order of February 3, 1941. On May 23, 1941, defendant filed a verified answer to plaintiff's petition. On January 12, 1942, Judge Prystalski entered the following order in the cause:

"This Cause Coming On To Be Heard on motion of Samuel J. Andalman, attorney for the Plaintiff, and the Court having the written motion of the plaintiff and the petition of the plaintiff heretofore filed on, to-wit, May 6, 1941, in the nature of a substitute for the writ of error coram nobis, and the sworn answer of the defendant filed May 25, 1941, to said motion and petition of the plaintiff, and both sides being now represented in open Court and the Court being fully advised in the premises, without any oral evidence offered or received

"The Court Finds:

"That the allegations of the plaintiff's petition are true.

"It Is Therefore Ordered that the said motion and petition of the plaintiff is hereby allowed and granted, and

THE TRUST COMPANY OF CHICAGO,
a Corporation, as Administrator
for of the Estate of Thomas
Desiderio, Deceased,
Appellee,
v.
PUBLIC SERVICE COMPANY OF
NORTHERN ILLINOIS, a Corpora-
tion,
Appellant.

MR. JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

On February 3, 1941, the aforesaid cause was upon a calendar called the "No Progress" calendar and on that date Judge Epstein entered the following order: "On order of court it is ordered that the above entitled cause do and the same is hereby dismissed for want of prosecution without costs." On May 6, 1941, plaintiff filed a verified petition under section 75 of the Civil Practice Act to vacate the order of February 3, 1941. On May 23, 1941, defendant filed a verified answer to plaintiff's petition. On January 12, 1942, Judge Epstein entered the following order in the cause:

"This cause coming on to be heard on motion of Samuel J. Anshman, attorney for the plaintiff, and the court having the written motion of the plaintiff and the petition of the plaintiff heretofore filed on, to-wit, May 6, 1941, in the nature of a substitute for the writ of error coram nobis, and the sworn answer of the defendant filed May 23, 1941, to said motion and petition of the plaintiff, and both sides being now represented in open court and the court being fully advised in the premises, without any oral evidence offered or received

"The Court finds:

"That the allegations of the plaintiff's petition are

It Is Further Ordered that the order entered on February 3, 1941, dismissing this cause be and the same is hereby vacated and set aside and held for naught."

Defendant appeals from that order.

Plaintiff's verified petition recites:

"Now comes the plaintiff, The Trust Company of Chicago, an Illinois corporation, Administrator of the Estate of Alfonso Desiderio, deceased, and respectfully petitions the Court to set aside and vacate the order entered in this cause by His Honor, Judge Benjamin P. Epstein, on February 3, 1941, whereby through inadvertence and oversight, this Court ordered the dismissal of the above entitled cause, and petitioner respectfully represents the following:

"1. That previous to October 11, 1940, this cause was placed upon what this Court calls the 'No Progress Call' for the purpose of procuring further progress in this cause to the end that it would be disposed of.

"2. That your petitioner respectfully represents that it responded to said call and represented to the Court that there was pending in this cause the defendant's motion to strike the complaint and that thereupon the cause was continued to November 12, 1940, on said call, to permit further progress to be made in the cause, and with the distinct understanding that when such further progress was made, that the case would be taken off the 'No Progress Call.'

"3. That thereafter, on October 11, 1940, an argument was had before Judge Harry M. Fisher of this Court, with reference to the sufficiency of the statement of claim and an order was entered on said date sustaining defendant's motion to strike the complaint and granting the plaintiff leave to file an amended complaint and entering a rule for the defendant to plead to the amended complaint twenty days after the filing of same.

"4. That thereupon an amended complaint was filed by

It is further ordered that the writ be entered on February 5, 1941, dismissing this cause as and the same is hereby vacated and set aside and held for nothing.

Testimony taken from the record in this case is as follows: Plaintiff's verified petition in this case is for the purpose of obtaining an Illinois corporation, which is a corporation of Illinois, to be dissolved, and the property of the corporation to be sold and the proceeds thereof to be distributed to the creditors of the corporation. The petition is filed in the Circuit Court of Cook County, Illinois, and is captioned as follows: "Petition for the Dissolution of the Corporation of the Illinois Central Corporation and for the Sale of its Property and the Distribution of the Proceeds thereof to its Creditors."

"1. That the petition is filed in the Circuit Court of Cook County, Illinois, and is captioned as follows: 'Petition for the Dissolution of the Corporation of the Illinois Central Corporation and for the Sale of its Property and the Distribution of the Proceeds thereof to its Creditors.'"

"2. That the petition is filed in the Circuit Court of Cook County, Illinois, and is captioned as follows: 'Petition for the Dissolution of the Corporation of the Illinois Central Corporation and for the Sale of its Property and the Distribution of the Proceeds thereof to its Creditors.'"

"3. That the petition is filed in the Circuit Court of Cook County, Illinois, and is captioned as follows: 'Petition for the Dissolution of the Corporation of the Illinois Central Corporation and for the Sale of its Property and the Distribution of the Proceeds thereof to its Creditors.'"

the plaintiff on October 30, 1940 and on November 18, 1940, the defendant filed another motion to strike the amended complaint.

"5. That the plaintiff, on the 28th day of April, 1941, served notice on the defendant to the effect that on May 1, 1941, an order would be asked in the above entitled cause overruling the defendant's motion to strike the complaint; that thereupon, on said May 1, 1941, your petitioner learned for the first time that an order had been entered by His Honor, Judge Benjamin P. Epstein, on February 3, 1941, dismissing this cause for want of prosecution on the so-called 'No Progress Call.'

"6. That no notice of any kind was served upon your petitioner or its attorney that this cause would appear on the so-called 'No Progress Call' on February 3, 1941 and your petitioner and its attorney had no knowledge of the same and were under the impression and belief that on November 12, 1940, when said cause was to come up as aforesaid, the same would be taken from the said 'No Progress Call' because of the progress that had been made in and about the entry of the orders before said Judge Fisher, hereinabove referred to, and the other activity in the case,

"7. That if His Honor, Judge Epstein, had been advised of the progress that had actually been made, as shown by the record in this cause, the said order of February 3, 1941, dismissing said cause, would not have been entered and, therefore, your petitioner states that the order of February 3, 1941, dismissing this cause, was entered through oversight and inadvertence on the part of the Court.

"8. That this cause has never been noticed for trial or placed upon the trial call because the issues have not yet been joined.

"9. That this Court was without jurisdiction to enter an order on February 3, 1941, dismissing said cause.

"Wherefore Your Petitioner Prays that an order be

the plaintiff on October 30, 1940 and on November 18, 1940, the defendant filed another motion to strike the amended complaint.

"5. That the plaintiff, on the 25th day of April, 1941,

served notice on the defendant to the effect that on May 1, 1941,

an order would be asked in the above entitled cause by writing

the defendant's motion to strike the complaint; that thereupon,

on said May 1, 1941, your petitioner learned for the first time

that an order had been entered by His Honor, Judge Johnston P.

Wheeler, on February 3, 1941, dismissing the cause for want of

prosecution on the so-called 'No Progress Call'.

"6. That no notice of any kind was served upon your

petitioner or its attorney that this cause would appear on the

so-called 'No Progress Call' on February 3, 1941 and your peti-

tioner and its attorney had no knowledge of the same and were

under the impression and belief that on November 18, 1940, when

said cause was to come up as scheduled, the same would be taken

from the said 'No Progress Call' because of the progress that

had been made in and about the entry of the order before said

Judge Fisher, hereinafter referred to, and the other activity

in the case.

"7. That if His Honor, Judge Wheeler, had been advised

of the progress that had actually been made, as shown by the

record in this cause, the said order of February 3, 1941, dis-

missing said cause, would not have been entered and, therefore,

your petitioner states that the order of February 3, 1941, dis-

missing this cause, was entered through oversight and inadvertence

on the part of the Court.

"8. That this cause has never been noticed for trial or

placed upon the trial call because the issues have not yet been

joined.

"9. That this Court was without jurisdiction to enter

an order on February 3, 1941, dismissing said cause.

entered herein vacating and setting aside the said order entered on February 3, 1941."

As to the salient parts of defendant's verified answer: It denies that there was any understanding of any kind that the cause would be taken off of the No Progress Call when the case was called on October 7, 1940; alleges that the cause appeared on the No Progress Call on November 12, 1940, pursuant to the continuance order of October 7, 1940; that on November 12 the cause was called and continued to December 9, 1940, on which date it was continued to February 3, 1941, on which last date the cause was called and dismissed; that timely notice of each of the calls and continuances was published in the Chicago Daily Law Bulletin pursuant to Rule 25 of the Circuit court; that plaintiff and its counsel were bound to take notice of said calls, continuances, and the dismissal order; that by the exercise of ordinary care and diligence plaintiff should have known of all said calls, continuances and the dismissal order, and that any failure in that regard was necessarily due to a lack of care and diligence; that plaintiff knew or should have known that the cause was not taken off of said No Progress Call on November 12, 1940, nor at any time; denies that plaintiff or its counsel had any basis whatever for any impression or belief that the cause would be or had been taken off said No Progress Call prior to or after February 3, 1941; denies each and every allegation of fact stated in paragraph 7 of the petition; denies that the cause was dismissed through any oversight or inadvertence on the part of the court; states that the cause was placed upon the so-called "No Progress" calendar and upon Judge Epstein's call pursuant to the provisions of section 5 of Rule 22 of the Circuit court, and was called by Judge Epstein at the several times above mentioned pursuant to the provisions of said rule; denies that the court was without jurisdiction to enter the order of February 3, 1941; alleges that prior to and continuously since the filing of the complaint there was in full force and

entered herein vacating and setting aside the said order entered

on February 3, 1941.

As to the salient facts of defendant's verified answer:

It denies that there was any understanding of any kind that the cause would be taken off of the No Progress Call when the cause was called on October 7, 1940; alleges that the cause appeared on the No Progress Call on November 12, 1940; pursuant to the continuance order of October 7, 1940; that on November 12 the cause was called and continued to December 1, 1940, at which date it was continued to February 3, 1941, on which date the cause was called and dismissed; that timely notice of each of the aforesaid continuances was published in the Chicago Daily Law Bulletin pursuant to Rule 25 of the Circuit Court; that plaintiff and his counsel were bound to take notice of said calls, continuances, and the dismissal order; that by the exercise of ordinary care and diligence plaintiff should have known of all said calls, continuances and the dismissal order, and that any failure in that regard was necessarily due to a lack of care and diligence; that plaintiff knew or should have known that the cause was not taken off of said No Progress Call on November 12, 1940, nor at any time; denies that plaintiff or his counsel had any basis whatever for any impression or belief that the cause would be or had been taken off said No Progress Call prior to or after February 3, 1941; denies each and every allegation of fact stated in paragraph 7 of the petition; denies that the cause was dismissed through any oversight or inadvertence on the part of the court; states that the cause was placed upon the so-called "No Progress" calendar and upon Judge Epstein's call pursuant to the provisions of section 5 of Rule 25 of the Circuit Court, and was called by Judge Epstein at the several times above mentioned pursuant to the provisions of said rule; denies that the court was without jurisdiction to enter the order of February 3, 1941; alleges that prior to and continuously

effect Rule 22 and section 5 thereof, which provides, inter alia, for the preparation of calendars of cases "in which no action has been taken within one year," and the assignment of such calendars for disposition; that the instant cause was placed upon such a calendar and also appeared upon Judge Epstein's "No Progress Call" for Monday, October 7, 1940, at 10 a. m.; that prior to and continuously since the filing of the complaint Rule 25 of the Circuit court has been in full force and effect, which rule pertains to "Notice of Calls" and provides:

"Sec. 1. Parties shall take notice of all calls of the trial calendar as well as of all other calendars and lists provided for in these Rules.

"Sec. 2. Unless otherwise directed by the Executive Committee, notice of all calls shall be published in the Chicago Daily Law Bulletin not later than in its issue for the day on which the call is to be had."

The answer further alleges that plaintiff's attorney, pursuant to announcements appearing in the Bulletin, responded to the call before Judge Epstein on October 7, 1940, and the cause was at that time continued to November 12, 1940; that the announcements for the November 12, 1940, call appeared in the Bulletin; that the cause was accordingly called by Judge Epstein on November 12 but that neither plaintiff nor its attorney responded to the call on November 12 and the cause was continued to December 9, 1940, and a notice of the continuance appeared among the orders of Judge Epstein in the November 12, 1940, issue of the Bulletin; that the December 9 call and the order of continuance to February 3, 1941, appeared in the Bulletin announcements; that "thereafter there appeared in the January 30 and 31, 1941, and February 1, 1941, issues of said Chicago Daily Law Bulletin announcements that said cause would appear on the 'No Progress Call' of Judge Epstein on Monday, February 3, 1941; that said cause did appear on said call of Judge Epstein on February 3, 1941, and, upon the call of

effect Rule 22 and section 5 thereof, which provides, inter alia, for the preparation of calendars of cases "in which no action has been taken within one year," and the assignment of such calendars for disposition; that the instant cause was placed upon such a calendar and also appeared upon Judge Epstein's "No Progress Call" for Monday, October 7, 1940, at 10 a. m.; that prior to and contemporaneously since the filing of the complaint, Rule 22 of the Circuit Court has been in full force and effect, which rule requires to

"Notice of Call" and provides:

"Sec. 1. Parties shall take notice of the trial calendar as well as of all other orders and lists provided for in these Rules.

"Sec. 2. Unless otherwise directed by the presiding Committee, notice of all calls shall be published in the Chicago Daily Law Bulletin not later than in the case of the call on which the call is to be had."

The answer further alleges that plaintiff's attorney, pursuant to announcements appearing in the Bulletin, responded to the call before Judge Epstein on October 7, 1940, and the cause was at that time continued to November 12, 1940; that the announcements for the November 12, 1940, call appeared in the Bulletin; that the cause was accordingly called by Judge Epstein on November 12 but that neither plaintiff nor its attorney responded to the call on November 12 and the cause was continued to November 2, 1940, and a notice of the continuance appeared among the orders of Judge Epstein in the November 12, 1940, issue of the Bulletin; that the December 9 call and the order of continuance to February 3, 1941, appeared in the Bulletin announcements; that thereafter there appeared in the January 30 and 31, 1941, and February 1, 1941, issues of said Chicago Daily Law Bulletin announcements that said cause would appear on the "No Progress Call" of Judge Epstein on Monday, February 3, 1941; that said cause did appear on said

the same, was dismissed; that there appeared in the February 3, 1941, issue of said Chicago Daily Law Bulletin, among the orders entered by Judge Epstein, an announcement that said cause was dismissed;" that neither plaintiff nor its attorney attended any of the aforesaid calls of the "No Progress" calendar except the call on October 7, 1940; that plaintiff failed and neglected to respond to any of the subsequent calls of the cause or the continuances; that plaintiff never made any attempt to have the cause removed from the "No Progress Call;" denies that the dismissal of the cause resulted from any mistake of fact on the part of the court and denies that plaintiff is entitled to the relief prayed for in its petition and motion or any part thereof, and the answer prays that plaintiff's said petition and motion be denied.

Section 5 of Rule 22 of the Circuit court of Cook county provides:

"Sec. 5. From time to time, the Executive Committee shall cause the Clerk of the Court to prepare separate law and chancery calendars of all cases in which no action has been taken within one year and assign such calendars to one or more judges for disposition. When called on any such calendar, the cases listed thereon shall be called for trial. If the plaintiff is not ready for trial, the cause, except as hereinafter stated, shall be dismissed for want of prosecution. No continuance shall be granted at the instance of the plaintiff, but for good cause shown, the case may be passed under Rule 26. Any order of dismissal entered in pursuance hereof, may be vacated and the cause reinstated, at any time within thirty days from the date of such order, for good cause shown, upon motion and upon such reasonable terms as to costs and otherwise as the Court may deem proper in the circumstances."

In the Chicago Daily Law Bulletin of January 30, 1941, under the heading, "Announcements," appears the following:

"Judge Epstein, on Monday, Feb. 3, at 10 a. m. will

the same, was dismissed; that there appeared in the February 3, 1941, issue of said Chicago Daily Law Bulletin, among the orders entered by Judge Epstein, an announcement that said cause was dismissed; that neither plaintiff nor its attorney attended any of the aforesaid calls of the "No Progress" calendar except the call on October 7, 1940; that plaintiff failed and neglected to respond to any of the subsequent calls of the cause or the continuances; that plaintiff never made any attempt to have the cause removed from the "No Progress Call;" denies that the dismissal of the cause resulted from any mistake of fact on the part of the court and denies that plaintiff is entitled to the relief prayed for in its petition and motion or any part thereof, and the answer prays that plaintiff's said petition and motion be denied.

Section 5 of Rule 22 of the Circuit Court of Cook County provides:

"Sec. 5. From time to time, the Executive Committee shall cause the clerk of the court to prepare separate law and chancery calendars of all cases in which no action has been taken within one year and assign such calendars to one or more judges for disposition. When called on any such calendar, the cases listed thereon shall be called for trial. If the plaintiff is not ready for trial, the cause, except as hereinafter stated, shall be dismissed for want of prosecution. No continuance shall be granted at the instance of the plaintiff, but for good cause shown, the case may be passed under Rule 26. Any order of dismissal entered in pursuance hereof, may be vacated and the cause reinstated, at any time within thirty days from the date of such order, for good cause shown, upon motion and upon such reasonable terms as to costs and otherwise as the Court may deem proper in the circumstances."

In the Chicago Daily Law Bulletin of January 30, 1941, under the heading, "Announcements," appears the following:

"Judge Epstein, on Monday, Feb. 3, at 10 a. m. will

have a call of the 'No Progress Call', pursuant to the provisions of Section 5 of Rule 22 of the General Rules of the Circuit court. This call consists of cases in which no action has been taken within one year and includes cases which were filed on or before Jan. 31, 1940.

"If no response is made by either party on this call, cases will be dismissed. If plaintiff fails to appear, case will be dismissed on motion of the defendant. If defendant fails to appear, the court may enter judgment or assign the case forthwith to another judge for disposition." (*Italics ours.*) Here follows a list of cases, among which appears the instant case.

In the Daily Law Bulletin of January 31, 1941, under the heading, "Announcements," appears the following:

"Judge Epstein, on Monday, Feb. 3, at 10 a. m. will have a call of the 'No Progress Call', pursuant to the provisions of Section 5 of Rule 22 of the General Rules of the Circuit court. This call consists of cases in which no action has been taken within one year and includes cases which were filed on or before Jan. 31, 1940.

"If no response is made by either party on this call, cases will be dismissed. If plaintiff fails to appear, case will be dismissed on motion of the defendant. If defendant fails to appear, the court may enter judgment or assign the case forthwith to another judge for disposition.

"A list of the cases can be found under Monday's call."
(*Italics ours.*)

In the same Bulletin appears Judge Epstein's call for Monday, February 3. The call, a lengthy one, does not include the instant cause. In the Bulletin of February 1, 1941, under the heading, "Announcements," appears the same announcement as was made in the issue of January 31, and there also appears the call for Judge Epstein for February 3. It is the same call as appears in the issue of January 30, and does not include the instant

have a call of the 'No Progress Call', pursuant to the provisions of Section 5 of Rule 22 of the General Rules of the District Court. This call consists of cases in which no action has been taken within one year and includes cases which were filed on or before Jan. 31, 1940.

"If no response is made by either party on this call, cases will be dismissed. If plaintiff fails to appear, case will be dismissed on motion of the defendant. If defendant fails to appear, the court may enter judgment or assign the case forthwith to another judge for disposition." (Italics ours.) Here follows a list of cases, among which appears the instant case.

In the Daily Law Bulletin of January 31, 1941, under the heading, "Announcements," appears the following:

"Judge Epstein, on Monday, Feb. 3, at 10 a. m. will have

a call of the 'No Progress Call', pursuant to the provisions of Section 5 of Rule 22 of the General Rules of the District Court. This call consists of cases in which no action has been taken within one year and includes cases which were filed on or before Jan. 31, 1940.

"If no response is made by either party on this call, cases will be dismissed. If plaintiff fails to appear, case will be dismissed on motion of the defendant. If defendant fails to appear, the court may enter judgment or assign the case forthwith to another judge for disposition.

"A list of the cases can be found under January's call."

(Italics ours.)

In the same Bulletin appears Judge Epstein's call for Monday, February 3. The call, a lengthy one, does not include the instant case. In the Bulletin of February 1, 1941, under the heading, "Announcements," appears the same announcement as was made in the issue of January 31, and there also appears the call for Judge Epstein for February 3. It is the same call as

appears in the issue of January 31 and does not include the instant

cause. February 2, 1941, fell on Sunday. In the Bulletin of Monday, February 3, 1941, appear many orders entered by Judge Epstein on that date. One shows that the instant cause was "dis n c wt pros." While defendant in its verified answer charges that counsel for plaintiff was negligent in not appearing before Judge Epstein on February 3, it is significant that it does not aver in its answer that its counsel was present upon the call that day. The announcements made by Judge Epstein stated that if no response was made by either party on the call the case would be dismissed; that if plaintiff failed to appear the case would be dismissed on motion of the defendant. The order of dismissal entered by Judge Epstein shows that it was entered on "Ordn ct," and that the suit was dismissed "n c." It is admitted that counsel for plaintiff was not present at the time the order was entered and if counsel for defendant had been present the case undoubtedly would have been dismissed on motion of defendant and costs against plaintiff would have been allowed. We have a right to presume from the record that no response was made by either party and, therefore, in accordance with the announcements, the court dismissed the cause and without costs to either party.

Two contentions are raised by defendant: (1) "No error of fact was committed by the court in dismissing this cause for want of prosecution;" and (2) "Plaintiff was required to prove that it and its counsel were free from negligence in the premises," and they have failed in that regard.

As to point (1): Defendant contends that the court committed no error of fact in dismissing the cause; that if there was any error, it was one of law and not of fact. The argument of counsel for defendant amounts to this, that Judge Epstein, on February 3, 1941, had before him the record in this cause and it must be presumed that "the trial court decided that this [progress] was not sufficient to prevent a dismissal," that in so deciding he applied the law to the facts shown of record and, therefore,

he applied the law to the facts shown of record and that in so deciding was not sufficient to prevent a dismissal, "that in so deciding must be presumed that the trial court decided that this [progress] February 3, 1941, had before him the record in this case and it of counsel for defendant amounts to this, that Judge Epstein, on was any error, it was one of law and not of fact. The argument committed no error of fact in dismissing the cause; that if there As to point (1): Defendant contends that the court and they have failed in that regard.

that it and its counsel were free from negligence in the premises," want of prosecution;" and (2) "Plaintiff was required to prove of fact was committed by the court in dismissing this cause for Two contentions are raised by defendant: (1) "No error court dismissed the cause and without costs to either party, the party and, therefore, in accordance with the announcements, the to preserve from the record that no response was made by either costs against plaintiff would have been allowed. We have a right undoubtedly would have been dismissed on motion of defendant and entered and its counsel for defendant had been present the case counsel for plaintiff was not present at the time the order was of," and that the suit was dismissed "n.o." It is admitted that missal entered by Judge Epstein shows that it was entered on "n.o." would be dismissed on motion of the defendant. The order of dismissal be dismissed; that if plaintiff failed to appear the case that it no response was made by either party on the call the case call that day. The announcements made by Judge Epstein stated does not aver in its answer that its counsel was present upon the day before Judge Epstein on February 3, it is significant that it charges that counsel for plaintiff was negligent in not appearing "dis n o vt proe." While defendant in its verified answer Epstein on that date. One shows that the instant cause was Monday, February 3, 1941, appear many orders entered by Judge cause. February 3, 1941, fell on Sunday. In the Bulletin of

if he made a mistake it was one of law. It is a sufficient answer to this contention to say that it ignores the three announcements made by Judge Epstein that the call for February 3, 1941, "consists of cases in which no action has been taken within one year." In view of the three announcements in the Bulletin it would amount to an unwarranted reflection upon Judge Epstein to assume that had the clerk informed the judge of the state of the record in the instant case the order of dismissal would have been entered. As has been often stated, a judge, as well as an attorney, may be misled by the fault of the clerk. Defendant further contends that when Judge Prystalski, on January 12, 1942, had before him the petition to vacate the order of January 3, 1941, the same facts were presented to him that were "also presented by the record to Judge Epstein on February 3, 1941," and therefore "Judge Prystalski merely reviewed the order of Judge Epstein," and Judge Prystalski was without power to review Judge Epstein's order. It is a sufficient answer to this contention to say that the instant proceeding is a new suit and that Judge Prystalski in trying it and in entering judgment therein was not sitting in review of the original suit.

The "No Progress" calendar was made up as the result of an order of the Executive Committee to the clerk of the court to prepare a calendar of all cases "in which no action has been taken within one year," and under that order it was the duty of the clerk to determine from the records what cases should be placed on that calendar. The clerk made up the calendar and it was assigned to Judge Epstein. On October 7, 1940, Judge Epstein had a call of this calendar, at which time plaintiff's attorney responded and stated to the court that defendant had filed a motion to strike plaintiff's complaint and that the motion was pending, and thereupon the cause was continued to November 12, 1940. It may be presumed that the trial court in entering that order considered that good cause had been shown by plaintiff and that the purpose of the continuance order was to permit further progress

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answer to this contention to say that it ignores the three

announcements made by Judge Epstein that the call for February

3, 1941, "consists of cases in which no action has been taken

within one year." In view of the three announcements in the

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of the state of the record in the instant case the order of

dismissal would have been entered. As has been often stated,

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had a call of this calendar, at which time Plaintiff's attorney

responded and stated to the court that defendant had filed a

motion to strike Plaintiff's complaint and that the motion was

pending, and thereupon the case was continued to November 12, 1940.

It may be presumed that the trial court in entering that order con-

to be made. Plaintiff then called up for disposition defendant's motion to strike the complaint, before Judge Fisher, and on October 11, 1940, Judge Fisher sustained the motion to strike, gave plaintiff twenty days to file an amended complaint, and defendant twenty days thereafter to plead to the amended complaint. Plaintiff filed an amended complaint on October 30, 1940, and when the case was again called on the "No Progress Call" before Judge Epstein on November 12, 1940, it was continued to December 9, 1940, and we must presume that Judge Epstein continued the cause because of the fact that progress had been made in the cause since October 7, 1940. On November 18, 1940, defendant filed a motion to strike the amended complaint, and when the cause was called before Judge Epstein on December 9 it was continued until February 3, 1941. It must be noted that in the announcements made by Judge Epstein in the Daily Law Bulletins for January 30, 31 and February 1, it was stated that on Monday, February 3, at 10:00 a. m., he would have a call of the No Progress Call and that "this call consists of cases in which no action has been taken within one year," and that in his announcements of January 31 and February 1 it is stated that "a list of the cases can be found under Monday's call." The Bulletins of January 31 and February 1 contain his call of cases for February 3, 10:00 a. m., but in the list of cases to be called the instant one does not appear. It is plain from the announcements made by Judge Epstein that he did not intend that the clerk should place the instant case upon the call for February 3.

The argument of defendant that Judge Epstein is presumed to have known the condition of the record as to each of the cases upon his call for February 3 is not sound. As a matter of practice a trial judge, situated as Judge Epstein was on February 3, 1941, having a call of cases taken from an unusual calendar like the No Progress calendar, must depend on his clerk for information as to the state of the record as to each of the cases upon the

[illegible]

call, and, furthermore, Judge Epstein, in view of the announcements that he had made, had a right to assume, and undoubtedly did assume, that the clerk, in making up the call, had followed the instructions of the court as plainly stated in the announcements. It is idle to argue that the court had no right to assume in passing upon the cases as they were called that the clerk had obeyed the announcements that the court had made in the Bulletin.

"The tendency of the law in this State is to allow the motion under section 89 whenever it is obvious that the action of the court is based upon the fault (either of omission or of commission) of the clerk of the court, as said in Brady v. Washington Ins. Co., 82 Ill. App. 380: 'A default of the clerk is one of the recognized grounds for a writ of error coram nobis.' Tidd's Practice, sec. 1137; Silverman v. Childs, 107 Ill. pp. 522. In the latter case the court said: 'The ignorance of the court as to the facts arose from the neglect of the clerk to strike the case off the regular calendar when he placed it upon the short cause calendar. Such negligence of the clerk is of sufficient ground for a writ of coram nobis, and authorized the court to pass upon the motion to set aside the judgment at a subsequent term.' In Brady v. Washington Ins. Co., supra; Silverman v. Childs, supra; and Aaron v. Jefferson Ice Co., 129 Ill. App. 570, there was, as in the instant case, a failure on the part of the clerk of the court to do a necessary ministerial act. In each of these cases the court entered an order based on a mistake or misrepresentation of the clerk, and then allowed the motion in the nature of the writ of error coram nobis." (Holbrook v. Lawton, 207 Ill. App. 497, 503, 504.) The Supreme court denied a certiorari in the Holbrook case.

The above rule was followed in the case of Butterick Publishing Co. v. Goldfarb, 242 Ill. App. 228, 232, and Lewis v. Heywood-Wakefield Co., 254 Ill. App. 606. See, also, Wosbut v. Juris, 266 Ill. App. 614; Nelson v. Hlavka, 266 Ill. App. 615.

call, and, furthermore, Judge Webster, in view of the announcements that he had made, had a right to assume, and undoubtedly did assume, that the clerk, in making up the bill, had followed the instructions of the court as plainly stated in the announcements. It is idle to argue that the court had no right to assume in passing upon the case as they were called that the clerk had obeyed the announcements that the court had made in the Bulletin. "The tendency of the law in this case is to allow the

motion under section 89 whenever it is obvious that the action of the court is based upon the fault (either of omission or of commission) of the clerk of the court. As seen in Washington Ins. Co., 82 Ill. 2d, 304; 1st Nat. Bk. of Ill., 107 Ill. 2d, 304.

is one of the recognized grounds for a writ of error coram nobis. Ida's Practice, sec. 1137; Silverman v. Childs, 107 Ill. 2d, 304. In the latter case the court said: "The ignorance of the court as to the facts arose from the neglect of the clerk to strike the case off the regular calendar when he placed it upon the short cause calendar, such negligence of the clerk is of sufficient ground for a writ of error coram nobis, and authorized the court to pass upon the motion to set aside the judgment at

a subsequent term." In Ida v. Washington Ins. Co., 82 Ill. 2d, 304; Silverman v. Childs, supra; and Nelson v. Jefferson Ins. Co., 107 Ill. App. 570, there was, as in the instant case, a failure on the part of the clerk of the court to do a necessary ministerial act. In each of these cases the court entered an order based on a mistake or misrepresentation of the clerk, and then allowed the motion in the nature of the writ of error coram nobis. (Holbrook v. Lawton, 237 Ill. App. 427, 503, 504).

The Supreme court denied a certiorari in the Holbrook case. The above rule was followed in the case of Antietam Publishing Co. v. Goldfarb, 242 Ill. App. 228, 232, and Lewis v. Heywood-Wakefield Co., 274 Ill. App. 606. See, also, Wood v. Lewis, 266 Ill. App. 614; Nelson v. Hawks, 266 Ill. App. 615.

In addition to the foregoing cases, there are a number of other cases in this State wherein petitions in the nature of coram nobis have been allowed because of misprisions of the clerk of the court. (See Carstedt v. Mills Novelty Co., 298 Ill. App. 275; Hooper v. Tabash Automotive Corp., 291 Ill. App. 618; Smyth v. Fargo, 307 Ill. 300; Cramer v. Commercial Men's Ass'n, 260 Ill. 516; Risedorf v. Effe, 250 Ill. App. 122.) In the well known case of Marabia v. Thompson Hospital, 309 Ill. 147, 152, the court states that one of the grounds for allowing the writ at common law was "error through the default of the clerk."

The contention of defendant that the court committed no error of fact in dismissing the cause, and that if there was any error it was one of law and not of fact, is without merit. Judge Epstein was not called upon to pass upon any question of law when he entered the order of dismissal. We are satisfied that he entered the order upon the assumption that no action had been taken in the instant case within one year. It is reasonably clear that the clerk, in spite of the announcements made by Judge Epstein, inadvertently placed this case upon the call for February 3.

Defendant strenuously argues that a petition like the one before us was not intended to relieve the party from the consequences of his own negligence, that plaintiff's counsel was negligent in failing to appear in court February 3, and that for that negligence, alone, plaintiff should have been denied relief. After a careful examination of the record we are satisfied that the instant contention should not be sustained.

In its reply brief defendant contends that plaintiff's petition contains no charge of any fault or breach of duty on the part of the clerk and therefore the conduct of the clerk in the premises cannot be considered. We think the petition is sufficiently broad to support a theory of fact that the trial court

inadvertently dismissed the cause because of the misprision of the clerk.

It is the established policy of the courts to give everyone his day in court. In the case at bar the order of dismissal entered by Judge Epstein, if sustained, would have the effect of terminating plaintiff's right of action. We do not believe that the record warrants such a result.

The judgment of the Circuit court of Cook county is sustained.

JUDGMENT SUSTAINED.

Friend, P. J., and Sullivan, J., concur.

inadvertently dismissed the cause because of the misapplication
of the clerk.

It is the established policy of the courts to give
everyone his day in court. In the case at bar the order of
dismissal entered by Judge Epstein, if sustained, would have
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not believe that the record warrants such a result.
The judgment of the Circuit Court of Cook County
is sustained.

THOMAS M. THOMPSON.

THOMAS M. THOMPSON, J., Clerk.

42696

W. H. GOODSTEIN MILLINERY
COMPANY, INC., a corporation,
et al.,

Appellants,

v.

BERKLEY, INC., a corporation,
et al.,

Appellees.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A complaint by W. H. Goodstein Millinery Company, Inc., a corporation, and William H. Goodstein against Berkley, Inc., a corporation, Morris L. Simons, Celestine Simons and Calmon P. Golder. Celestine Simons and Calmon P. Golder filed answers to the complaint. Morris L. Simons and Berkley, Inc., a corporation, filed answers and counterclaims. Plaintiffs filed an answer to the counterclaim of Berkley, Inc., a corporation. The cause was referred to a master in chancery, who subsequently filed a report, and the exceptions filed by plaintiffs to the report were overruled by the chancellor, Judge Lupe. Thereafter plaintiffs filed a "Supplemental Defense," and after the chancellor had disposed of the issues raised by that defense the decree was entered, from which plaintiffs have appealed. Upon motion of defendants William H. Goodstein was made an additional party plaintiff and by leave of court the complaint was amended to include William H. Goodstein as a party plaintiff.

The complaint is a lengthy one and we will adopt plaintiffs' brief statement of it: "Complaint in chancery to recover damages by reason of moneys paid by the lessee and guarantor on a lease because of the default of the assignee of the lessee, Berkley, Inc., a corporation, in payment of rent which it had assumed and agreed to pay, and asking that a receiver be appointed for said corporation, and that the shareholders be held personally liable because the assets of said corporation were distributed to them, and that they be restrained from removing the assets from

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CHICAGO, ILLINOIS

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liable because the assets of said corporation were distributed to
for said corporation, and that the shareholders be held personally
assumed and agreed to pay, and asking that a receiver be appointed
Berkley, Inc., a corporation, in payment of rent which it had
a lease because of the default of the assignee of the lessee,
damages by reason of money paid by the lessee and guarantor on
this brief statement of it: "to plaintiff in order to recover
The complaint is a lengthy one and we will adopt plain-
argued to include William H. Goodstein as a party plaintiff.
tional party plaintiff and by leave of court the complaint was
Upon motion of defendant William H. Goodstein was made an addi-
the decree was entered, from which plaintiff have appealed.
counselor had disposed of the issues raised by that defendant
plaintiff filed a "Sufficiency of Defense," and after the
report were overruled by the chancellor, Judge Pope. Thereafter
filed a report, and the exceptions filed by plaintiff to the
The cause was referred to a master in equity, who subsequently
an answer to the complaint in which it was alleged that defendant
portion, this answer was counterclaiming. Plaintiff filed
to the complaint, Lewis H. Brown and Son, Inc., a cor-
Geller, Celestine Brown and Son, Inc., both of which were
a corporation, Lewis H. Brown, Celestine Brown and Son, Inc.,
a corporation, and William H. Goodstein as third party, Inc.,
A complaint by William H. Goodstein, Plaintiff, against

the jurisdiction or from encumbering said assets."

As to the answer of Berkley, Inc., defendant, it is sufficient to say that it admits owing \$2,750 as rent for May and June, 1938, for the premises, 127 South State street, Chicago, Illinois, but it denies owing for any rent that accrued after July 1, 1938, for the reason that plaintiffs were in possession of the premises after July 1, 1938, under the terms of the agreement of February 1, 1937, and that plaintiffs, under said terms, were liable for the rent after July 1, 1938. The counterclaim of Berkley, Inc., alleges that pursuant to a demand made by plaintiffs that defendant surrender to plaintiffs its three stores and the personal property contained therein in accordance with the agreement of February 1, 1937, defendant, on July 1, 1938, delivered possession of the premises and personal property to plaintiffs; that at the time of the delivery of the premises and personal property to plaintiffs the said personal property had a reasonable value in excess of \$6,000; that plaintiffs held an alleged sale of the personal property without notice to the defendant and without its knowledge, acquiescence or consent; that the reasonable value of said personal property should be set off against whatever indebtedness is found to be legally due plaintiffs, and the excess, if any, paid over to the defendant.

The salient facts appear in the report of the master and in the decree. The master found that on February 15, 1930, L. E. Waterman Company, a New York corporation, as lessor, remised to W. H. Goodstein Millinery Company, Inc., an Illinois corporation, as lessee, the second and third floors and other space in the premises commonly known as 127 South State street, Chicago; that on July 19, 1930, Goodstein Millinery Company executed an assignment of the lease to Berkley, Inc.; that the latter accepted the assignment, consent thereto having been given by Water-

the jurisdiction or from entering with assets."

As to the answer of Berkeley, Inc., defendant, it is

sufficient to say that it is a party owing \$2,100 as rent for May

and June, 1938, for the premises, 127 South State Street,

Chicago, Illinois, but it denies owing for any rent for

periods after July 1, 1938, for the reason that plaintiffs

were in possession of the premises after July 1, 1938, under

the terms of the agreement of February 1, 1937, and that plaintiffs

under said terms, were liable for the rent for July 1,

1938. The counterclaim of Berkeley, Inc., alleges that defendant

to a demand made by plaintiffs that defendant return to

plaintiffs its three stores and the personal property contained

therein in accordance with the agreement of February 1, 1937,

defendant, on July 1, 1938, delivered possession of the premises

and personal property to plaintiffs; and as to the value of the

delivery of the premises and personal property to plaintiffs

the said personal property had a reasonable value in excess of

\$6,000; that plaintiffs held an alleged claim for the personal

property without notice to the defendant and without its approval

edge, acquiescence or consent; that the reasonable value of said

personal property should be set off against the other indebtedness

is found to be legally due plaintiffs, and the excess, if any,

paid over to the defendant.

The salient facts appear in the report of the master

and in the decrees. The master found that on February 1, 1930,

L. W. Waterman Company, a New York corporation, as lessor,

remised to W. H. Goodstein Millinery Company, Inc., an Illinois

corporation, as lessee, the second and third floors and other

space in the premises commonly known as 127 South State Street,

Chicago; that on July 19, 1930, Goodstein Millinery Company executed

an assignment of the lease to Berkeley, Inc.; that the latter ac-

man Company, and that thereafter Berkley, Inc., continued to occupy said premises; that the assignment provided that Berkley, Inc., should comply in all respects with all the terms and conditions of said lease and should pay promptly all rents and other charges accruing from time to time thereunder; that Goodstein Millinery Company, Morris L. Simons, Celestine Simons and Berkley, Inc., entered into an agreement whereby said William H. Goodstein sold all his interest in Berkley, Inc., to defendant Morris L. Simons, and from February 1, 1937, to the date of the filing of the complaint defendants Morris L. Simons and Celestine Simons became the sole stockholders of defendant Berkley, Inc.; that as collateral security for the faithful performance by Berkley, Inc., of its undertakings in said agreement of February 1, 1937, Berkley, Inc., on February 15, 1937, executed to William H. Goodstein a chattel mortgage whereby it conveyed to Goodstein all the furniture, fixtures and equipment in the stores operated by Berkley, Inc., at 127 South State street, Chicago, Illinois, 6440 Sheridan Road, Chicago, Illinois, and at 601-03 Diversey Parkway, Chicago, Illinois; that Berkley, Inc., subsequently made default in payment of the rent due under the terms of the said lease for the months of May and June, 1938; that the record shows no demand made upon said Berkley, Inc., by Waterman Company for said rent in arrears and shows no action taken or threatened to be taken by said lessor by reason of said arrears; that on or about June 15, 1938, knowledge of said default came to Goodstein Millinery Company and William H. Goodstein; that immediately upon the receipt of such information William H. Goodstein caused to be served on Berkley, Inc., a demand that said premises be surrendered to Goodstein in accordance with the terms of the contract of February 1, 1937, and that all the furniture, fixtures and equipment in the three stores theretofore operated by Berkley, Inc., be turned over to Goodstein;

man Company, and that thereafter Berkeley, Inc., continued to occupy said premises; that the agreement provided that Berkeley, Inc., should comply in all respects with the terms and conditions of said lease and should pay promptly all taxes and other charges accruing from time to time thereunder; that Berkeley, Inc., entered into an agreement with William K. Goodstein and H. Goetzstein and from February 1, 1937, to the date of the filing of the complaint heretofore filed, William K. Goodstein and H. Goetzstein became the sole stockholders of Berkeley, Inc.; that as a result of the agreement heretofore filed, Berkeley, Inc., of the name of which in said agreement of February 1, 1937, Berkeley, Inc., on February 1, 1937, executed to William K. Goodstein a general assignment whereby all conveyed to Goetzstein all the fixtures, furniture and equipment in the stores operated by Berkeley, Inc., at 121 North State Street, Chicago, Illinois, 640 Sheridan Road, Chicago, Illinois, and at 601-63 Diversey Parkway, Chicago, Illinois; that Berkeley, Inc., subsequently made default in payment of the rent due under the terms of the said lease for the month of June, 1938; that the record shows no demand made upon said Berkeley, Inc., by Western Company for said rent in arrears and shows no action taken or threatened to be taken by said Western Company for reason of said default on or about June 15, 1938, knowledge of said default came to Goodstein, William K. Goodstein and William K. Goodstein; that immediately upon the receipt of such information William K. Goodstein caused to be served on Berkeley, Inc., a demand that said premises be surrendered to Goodstein in accordance with the terms of the contract of February 1, 1937, and that all the fixtures, furniture and equipment in the three stores heretofore operated by Berkeley, Inc., be turned over to Goodstein;

that pursuant to said demand on or about July 1, 1938, Berkley, Inc., surrendered to Goodstein all of the furniture, equipment and fixtures described in said chattel mortgage and delivered to Goodstein possession of the premises described as 127 South State street, Chicago, Illinois; that the agreement of February 1, 1937, provides as follows: "Provided that in the event said Goodstein shall, under the terms hereof, elect to exercise his right to take possession of said stores and does take possession thereof, then and in that event said Goodstein and said Millinery Company agree to pay the rent reserved under the respective leases for all of said stores so long as either said Goodstein, said Millinery Company or any nominee, assignee, sub-lessee or licensee of either of them is or are in possession of any of said three stores, and otherwise to carry out and perform the terms and provisions of the respective leases; provided further that in such event neither said Simons nor said Berkley shall be liable for and hereby are expressly released from liability to contribute to either said Goodstein or said Millinery Company for or on account of any sums paid by either of them as rent for said three stores, and said Goodstein and said Millinery Company further agree to indemnify and save harmless said Simons and said Berkley against all claims which may be established against them or either of them by reason of the nonpayment of such rental." The report further finds that Goodstein owns or controls all of the capital stock of the W. H. Goodstein Millinery Company, Inc., and through his attorney, retained possession of the store at 127 South State street until about August 20, 1938, and exercised sole ownership and control thereof; that by reason of the provisions of the contract of February 1, 1937, W. H. Goodstein Millinery Company, Inc., and William H. Goodstein became liable for the rent accruing on the store for the months of July and August; that the bill alleges that the furniture,

that pursuant to said demand on or about June 1, 1938, the
Inc., transferred to Goodstein the right to possession
and fixtures described in a bill of sale dated and captioned
to Goodstein possession of the premises located at 127 South
State Street, Chicago, Illinois; and that the bill of sale
dated June 1, 1938, provided as follows: "I, the undersigned
Goodstein, do hereby transfer to the said Goodstein all my
right to the possession of the premises located at 127 South
State Street, Chicago, Illinois, and all the fixtures and
contents thereof to the said Goodstein, and the said Goodstein
agrees to pay the rent reserved in the lease between the
for all of said stores as from the date hereof, and to
Millinery Company or any nominee, agent, or assignee or licen-
see of either of them as to the payment of any of said
three stores, and otherwise to carry out and perform the terms
and provisions of the lease between the said parties, and that
in such event neither of the parties hereto shall be
liable for and hereby are expressly released from liability to
contribute to either said Goodstein or said Millinery Company
for or on account of any sums paid by either of them as rent
for said three stores, and said Goodstein and said Millinery
Company further agree to indemnify and save harmless said
Goodstein and said Millinery Company against all claims which may be estab-
lished against them or either of them by reason of the nonpayment
of such rental." The report further finds that Goodstein owns or
controls all of the capital stock of the said Goodstein Mill-
inery Company, Inc., and through his attorney, retained possession
of the store at 127 South State Street until about August 30,
1938, and exercised sole ownership and control thereof; that by
reason of the provisions of the contract of February 1, 1937,
W. H. Goodstein Millinery Company, Inc., and William H. Goodstein
became liable for the rent accruing on the store for the months
of July and August; that the bill alleges that the fixtures

fixtures and equipment described in the chattel mortgage which was taken into possession by William H. Goodstein and W. H. Goodstein Millinery Company, Inc., was sold for the sum of \$435.50 and that credit for said amount was given to Berkley, Inc.; that the master finds as a fact that the fair cash market value of said furniture, fixtures and equipment as of July 1, 1938, was \$3,753.50. The master further finds that no notice of the sale of any of said furniture, equipment or fixtures was given to Berkley, Inc., or to any agent, officer or employee thereof; that no report of said sale was delivered to Berkley, Inc., or to any officer, agent or employee thereof; that there is in the record no evidence as to the sale of any specific item included among such fixtures, furniture and equipment; that the testimony shows that the sum of approximately \$500 was received by William H. Goodstein or W. H. Goodstein Millinery Company, Inc., from the sale of said fixtures; that the evidence further shows that a relative by marriage of William H. Goodstein came into possession of one of the stores theretofore operated by Berkley, Inc.; that there is no evidence in the record that the assets of Berkley, Inc., were distributed to or among the stockholders thereof. The master recommended that the prayer of the complaint that a receiver be appointed to collect the assets of Berkley, Inc.; that an injunctive order be issued against Morris L. Simons and Celestine Simons, restraining them from removing from the jurisdiction of the court or from encumbering or otherwise transferring any of said personal assets or property; that an order be entered that the defendants account for assets of Berkley, Inc.; that the defendant be ordered to deposit with the clerk of the court the corporate and accounting records of Berkley, Inc.; that judgment be entered against the defendants Morris L. Simons, Celestine^{Simons} and Calmon P. Golder for the amount of plaintiff's claim; and that the individual defendants be held personally liable as

fixtures and equipment described in the attached mortgage which was taken into possession by William H. Goodstein and A. H. Goodstein Military Company, Inc., was sold for the sum of \$437.50 and that credit for said amount was given to Berkley, Inc.; that the master finds as a fact that the fair cash market value of said furniture, fixtures and equipment as of July 1, 1938, was \$3,753.50. The master further finds that no notice of the sale of any of said furniture, equipment or fixtures was given to Berkley, Inc., or to any agent, officer or employee thereof; that no report of a sale was delivered to Berkley, Inc., or to any officer, agent or employee thereof; that there is in the record no evidence as to the sale of any specific item included among said furniture, fixtures and equipment; that the testimony shows that the sum of up to \$400 was received by William H. Goodstein or A. H. Goodstein Military Company, Inc. from the sale of said fixtures; that the evidence further shows that a relative by marriage of William H. Goodstein came into possession of one of the stores theretofore operated by Berkley, Inc.; that there is no evidence in the record that the assets of Berkley, Inc., were distributed to or among the stockholders thereof. The master recommended that the prayer of the complaint that a receiver be appointed to collect the assets of Berkley, Inc.; that an injunctive order be issued against Morris L. Simons and Celestine Simons, restraining them from removing from the jurisdiction of the court or from encumbering or otherwise transferring any of said personal assets or property; that an order be entered that the defendant account for assets of Berkley, Inc.; that the defendant be ordered to deposit with the clerk of the court the corporate and accounting records of Berkley, Inc.; that judgment be entered against the defendants Morris L. Simons, Celestine and Calmon P. Golden for the amount of plaintiff's claim.

stockholders and directors, be denied in toto; and the master further recommended that defendant Berkley, Inc., should be charged with the sum of \$2,750 rent for May and June, 1938, for the premises known and described as 127 South State street, Chicago; that plaintiffs W. H. Goodstein Millinery Company, Inc., and William H. Goodstein, should be charged with the sum of \$3,753.50, the fair cash value of the furniture, equipment and fixtures taken possession of by said plaintiffs; that a judgment should be entered in favor of defendant Berkley, Inc., on its counterclaim for \$1,003.50; that the counterclaims of Morris L. Simons and Berkley, Inc., for sums alleged to be due by reason of the surrender and cancellation of the lease on the premises at 127 South State street be denied.

The "Supplemental Defense" filed by plaintiffs alleges that defendant Berkley, Inc., a corporation, was dissolved by action of the Attorney General on April 25, 1939, and therefore "the cause terminated in so far as said Berkley, Inc., is concerned." Defendants filed a verified answer to the supplemental defense and an order was entered that this answer also stand as a counterclaim on behalf of defendants Morris L. Simons and Celestine Simons for the relief asked by them. This answer and counterclaim alleges:

"1. That the decree alleged in said 'Supplemental Defense' to have been entered on April 25, 1939, dissolving the defendant, Berkley, Inc., was a matter of record not only in this court but also in the office of the Recorder of Cook County, Illinois, as required by statute; that by reason thereof the plaintiffs were charged with notice of such dissolution; that it was thereupon incumbent upon the plaintiffs to present their defense or plea based on such dissolution within a reasonable time after April 25, 1939; that notwithstanding the dissolution of Berkley, Inc., on April 25, 1939, the plaintiffs

advice time after April 15, 1935; that notwithstanding the
their defense or plea based on such dissolution within a reason-
that it was therefore incumbent upon the plaintiff to present
the plaintiff's were charged with notice of such dissolution;
Conner, Illinois, as required by statute; and the fact that
in this court but also in the State of Illinois, and that
the defendant, Conner, was a resident of Illinois and only
refused to have been married on April 15, 1935, and during
"If, then the divorce was granted in Illinois on April 15,
court within Illinois;

proceeded to hearing of this case on its merits before the Master to whom the case had theretofore been referred; that the plaintiffs thereafter on, to-wit: March 20, 1942, filed their answer to the counterclaims of the defendants but failed to set up as a defense the dissolution of Berkley, Inc.; that upon conclusion of the hearings before said Master and after the filing of said Master's report herein the plaintiffs filed objections to said Master's report but the fact of the dissolution of Berkley, Inc., was not raised by the plaintiffs in their said objections; that the plaintiffs by their failure to plead the dissolution of Berkley, Inc., as a defense during the entire pendency of this suit and until almost four years after the fact of the dissolution of Berkley, Inc., was a matter of public record thereby waived their right to such benefits as might have accrued to the plaintiffs if such fact had been timely pleaded.

"2. The defendants deny that the plaintiffs are in any event entitled to the relief prayed for in said 'Supplemental Defense.'

"3. That the sole stockholders of the defendant, Berkley, Inc., were the defendants, Morris L. Simons and Celestine Simons and that the plaintiffs' complaint so alleges; that upon the dissolution of Berkley, Inc., the defendants, Morris L. Simons and Celestine Simons, as such stockholders, became the equitable owners of any and all assets of said Berkley, Inc., subject only to the rights of creditors of said Berkley, Inc.; that the indebtedness which the Master herein and this court have found to be due from the plaintiffs to the defendant, Berkley, Inc., was an asset of Berkley, Inc., prior to its dissolution, viz: on July 1, 1938, and that if by reason of the dissolution of Berkley, Inc., the court should find that said corporation does not have the legal capacity to have a judgment and

and with them the time
solution of the
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1. Sampled

that the sole stockholders of the defendant, Berkley, Inc., were the defendants, Morris A. Simon and Celestine Simon and that the plaintiff, Simon & Sons, Inc., that upon the dissolution of Berkley, Inc., the plaintiff, Morris A. Simon and Celestine Simon, as the sole stockholders, became the equitable owners of the assets of the defendant, Inc., subject only to the rights of the stockholders of Berkley, Inc.; that the indebtedness which the plaintiff, Simon & Sons, Inc., had to the defendant, Berkley, Inc., was an asset of Berkley, Inc., prior to its dissolution, viz: on July 1, 1938, and that it is by reason of the dissolution of Berkley, Inc., the court should find that said corporation does not have the legal capacity to have a judgment and

decree entered in its favor against the plaintiffs, then this court should find that by reason of the dissolution of said Berkley, Inc., the indebtedness found to be due from the plaintiffs to said Berkley, Inc., is now due to the defendants, Morris L. Simons and Celestine Simons, sole stockholders of Berkley, Inc., and that a decree and judgment should be entered herein in favor of said Morris L. Simons and Celestine Simons and against the plaintiffs for the amount of such indebtedness."

Plaintiffs contend "that the defendant, Berkley, Inc. was liable for the entire amount of rent that the plaintiffs paid the lessors; that the value of the fixtures that came into possession of plaintiffs was \$500; that Berkley, Inc., having been dissolved, was incapable of maintaining a counterclaim; that no judgment could be rendered in favor of Berkley, Inc., and that no judgment could be rendered in favor of the stockholders of Berkley, Inc.;" that "the entry of the plaintiffs on the demised premises after the vacating of said premises by the defendant Berkley, Inc. was not an acceptance of the surrender," and "since there was no acceptance of the surrender by the plaintiffs, and plaintiffs did not use the premises and no business was conducted by them on the premises, they were not, as between the plaintiffs and Berkley, Inc., liable for the rent which accrued after July 1, 1938, but this obligation remained with Berkley, Inc.;" that all that plaintiffs did after their entering upon the premises was "to render the damage as light as possible and to protect themselves from unnecessary injury." As plaintiffs elected to demand possession of the three stores and the personal property contained therein, under the agreement of February 1, 1937, and as defendants complied with that demand, the rights of the parties must be determined by the provisions of that agreement. The agreement was drafted by plaintiffs' attorneys.

The decree finds: "5. That Berkley, Inc. subsequently

decree entered in its favor...
court should find that by reason of said...
Berkeley, Inc., the undersigned...
suits to said Berkeley, Inc., its...
I. Citizens and Collective...
and that a decree and judgment...
of said Morris I. Citizens and...
plaintiffs for the amount of...
plaintiffs contend "that..."
was liable for the entire amount...
the loss; that the value of...
sion of plaintiffs was \$50;...
solved, was found to be...
not could be rendered in favor of...
judgment could be rendered in favor of...
Berkeley, Inc.; that "the..."
premises after the vesting of said...
Berkeley, Inc., was not...
there was no...
plaintiffs it not use the...
by them on the premises, they...
and Berkeley, Inc., liable for...
1938, but this obligation...
that plaintiffs did...
"to render the..."
selves from...
possession of the three stores and the personal property...
therein, under the agreement of...
ants complied with that demand, the rights of the parties must be...
determined by the provisions of that agreement. The agreement...
was drafted by plaintiffs' attorneys.
The decree finds: "5. That Berkeley, Inc., subsequently

made default in the payment of the rent due for the months of May and June, 1938, in the sum of \$2,750.00 under the terms of the lease for the premises at 127 South State Street, Chicago, Illinois, that said sum was subsequently paid by the plaintiffs but that no demand was made upon said Berkley, Inc. by the lessor for said rent in arrears and that no action was taken, or threatened to be taken, by the lessor by reason thereof. 6. That on or about June 15, 1938, knowledge of said default came to the plaintiffs and that by reason of said non-payment of rent by Berkley, Inc., the plaintiff, William H. Goodstein, who owns or controls all of the capital stock of W. H. Goodstein Millinery Company, Inc., caused to be served on Berkley, Inc. on or about June 15, 1938, a demand that all premises be surrendered to the plaintiffs in accordance with the contract of February 1, 1937, and that all the furniture, fixtures and equipment in the three stores theretofore operated by said Berkley, Inc., be turned over to the plaintiffs; that pursuant to said demand, the defendant, Berkley, Inc. did on or about the first day of July, 1938, surrender to the plaintiffs all of the furniture, fixtures and equipment described in the said chattel mortgage, and deliver to the plaintiffs the keys to said three stores. 7. That no notice of the sale of any of said furniture, fixtures and equipment was given to Berkley, Inc., or to any agent, officer or employee thereof, that no report of sale was delivered to Berkley, Inc., or to any officer, agent or employee thereof; that no evidence was introduced by the plaintiffs as to the sale of any specific items included among such fixtures, furniture and equipment and that the evidence shows that a relative by marriage of said William H. Goodstein came into possession of one of the stores theretofore operated by Berkley, Inc.; that the plaintiffs retained possession of the store at 127 South State Street, Chicago, Illinois, until on or about August 20, 1938, and exercised sole ownership and control thereof and

made default in the payment of the rent for the months of May and June, 1938, in the sum of \$2,750.00 and the terms of the lease for the premises at 127 South State Street, Chicago, Illinois, that said and was subsequently paid by the plaintiff but that no demand was made upon said defendant, and the lease for said rent in arrears and the defendant's obligation was understood to be taken, by the lessor, as a matter of course, on or about June 15, 1938, including the sum of \$2,750.00 and the plaintiff and that by reason of the defendant's failure to pay the same, the plaintiff, Illinois, Incorporated, in compliance with all of the capital stock of the defendant, Illinois, Incorporated, Inc., ceased to be served on July 1, 1938, and on or about June 15, 1938, a demand that all fixtures be removed from the premises in accordance with the terms of the lease, and that all the furniture, fixtures and equipment in the store be removed therefrom, and that the defendant, Illinois, Incorporated, Inc., cease to operate by said defendant, Illinois, Incorporated, Inc., that pursuant to said demand, the defendant, Illinois, Incorporated, Inc., did on or about the first day of July, 1938, remove to the plaintiff all of the furniture, fixtures and equipment described in the said chattel mortgage, and a list of the items so removed to said three stores. The defendant, Illinois, Incorporated, Inc., failed to remove the said furniture, fixtures and equipment as required by the lease, or to any extent, effort or expense, and no report of sale was delivered to the plaintiff, Illinois, Incorporated, Inc., or to any of its agent or employee thereof, and no evidence was introduced by the plaintiff as to the sale of any of the items included among such fixtures, furniture and equipment and that the evidence shows that a relative by marriage of said William H. Goetzman came into possession of one of the stores theretofore operated by Goetzman, Inc.; that the plaintiff retained possession of the store at 127 South State Street, Chicago, Illinois, until on or about August 20, 1938, and exercised sole ownership and control thereof and

that by reason of the provisions of said contract of February 1, 1937, said plaintiffs became liable for the rent accruing on said store on and after July 1, 1938, amounting to \$2,062.50 and that the plaintiffs paid the same." The foregoing findings in the decree were warranted by the evidence. But plaintiffs contend that the provision in the agreement of February 1, 1937 (cited in full in the master's report and referred to in the decree), must be considered in connection with the following provision in the agreement: "It is expressly understood, however, that in the event said Goodstein and said Millinery Co., shall elect not to take possession of said stores, or if after electing to take possession, decide to abandon all three stores and permit the lessors of all of them to pursue their respective remedies, then and in that event the foregoing agreement by said Goodstein and said Millinery Co., to pay rent, and to release and indemnify said Simons and said Berkley, shall be of no further force or effect;" that after they took possession under the agreement of February 1, 1937, they decided "to abandon all three stores and permit the lessors of all of them to pursue their respective remedies," and that therefore "the foregoing agreement [the provision cited in full in the master's report] by said Goodstein and said Millinery Co., to pay rent, and to release and indemnify said Simons and said Berkley, shall be of no further force and effect." It is a sufficient answer to this contention to say that the evidence does not support plaintiffs' claim that after taking possession of the stores they decided "to abandon all three stores and permit the lessors of all of them to pursue their respective remedies," and the decree finds to the contrary. It will be noted that the master and the chancellor found that Berkley, Inc., should be charged with \$2,750 for the rent paid by plaintiffs for May and June, 1938, for the premises known as

127 South State street, Chicago, but that it should not be charged for any part of the rental that accrued on and after July 1, 1938.

Plaintiffs make a very short argument in support of their next contention, that "upon the payment of the rent plaintiffs were subrogated to all the rights of the lessor." It is a sufficient answer to the contention to say that plaintiffs elected to demand and take possession of the Berkley stores, furnishings, fixtures and equipment under the agreement of February 1, 1937, that Berkley, Inc., complied with the demand, and the parties are bound by the terms of that agreement.

Plaintiffs next contend: (1) "The fair cash value of the furniture and fixtures in question was established by the plaintiff's evidence of the price actually paid for the property at a bona fide sale." (2) "The defendant was not qualified to testify to the value of the furniture and fixtures in question." (3) "The defendant failed to establish the value of the furniture and fixtures in question by a preponderance of the evidence." To these contentions defendants answer: (a) "The plaintiffs having failed to foreclose their chattel mortgage were liable to Berkley, Inc., for the fair and reasonable value of the furniture, fixtures and equipment of which they took possession." (b) No notice was given defendants of the alleged sale. (c) "The finding by the Master that the reasonable value of the furniture, fixtures and equipment surrendered to the plaintiffs was on the date of the surrender, the sum of \$3,753.50 is in accordance with the manifest weight of the evidence." The master and the chancellor both found that the furniture, fixtures and equipment of the three stores had a fair cash market value as of said date, of \$3,753.50, and that plaintiffs should be charged with that amount, and after an examination of the evidence bearing upon the value of the chattels we are satisfied with their findings. If plaintiffs intended to hold

127 South State Street, Chicago, and that it should not be charged for any part of the rental that accrued on the latter July 1, 1938.

Plaintiffs make a very short answer to the report of their

next contention, that "upon the facts and the weight of the evidence were attributed to all the rights of the lessee." It is a direct answer to the contention to which the plaintiffs objected to demand and take possession of the furniture, fixtures and equipment under the agreement of July 1, 1937, that Barkey, Inc., complied with the terms of the agreement, and are bound by the terms of the agreement.

Plaintiffs next contend: (1) "The cash value of the furniture and fixtures in question was established by the plaintiffs' evidence of the price actually paid for the property at a bona fide sale." (2) "The cash value was not related to the value of the furniture and fixtures in question." (3) "The defendant failed to establish the value of the furniture and fixtures in question by a proper use of the evidence." (4) "The plaintiffs in giving failed to foreclose their debt against the furniture, fixtures, Inc., for the fair and reasonable value of the furniture, fixtures and equipment of which they took possession." (5) "No notice was given defendants of the alleged sale." (6) "The finding by the Master that the reasonable value of the furniture, fixtures and equipment surrendered to the plaintiffs was on the date of the surrender, the sum of \$5,750.00 is in accordance with the manifest weight of the evidence." The Master and the Chancellor both found that the furniture, fixtures and equipment of the three stores had a fair cash market value as of said date, of \$5,750.00, and that plaintiffs should be charged with that amount, and after an examination of the evidence bearing upon the value of the chattels we are satisfied with their findings. If plaintiffs intended to hold

an honest sale, why did they not give defendants notice of the sale.

Before passing upon several contentions raised by plaintiffs that are based upon the supplemental defense it is necessary for us to consider a contention, strenuously urged by defendants, that plaintiffs by their conduct waived the right to raise the point interposed in the supplemental defense, viz., the effect of the dissolution of Berkley, Inc., and that the chancellor should have so held. That there is force in defendants' contention clearly appears from the record. The defense interposed in the supplemental defense was not raised until after the master and the chancellor had decided the issues against plaintiffs. The corporation was dissolved on April 25, 1939, plaintiffs' exceptions to the master's report were overruled on October 15, 1942, and the supplemental defense was not filed until October 26, 1942. Plaintiffs seek to evade the effect of their failure to interpose the defense in apt time by calling attention to an averment in their affidavit in support of their petition for leave to file the supplemental defense, viz., that they did not learn until September 29, 1942, that Berkley, Inc., had been dissolved, but, as we have heretofore stated, the chancellor did not overrule plaintiffs' exceptions to the master's report until October 15, 1942. The evidence shows that on July 1, 1938, Berkley, Inc., acting in strict accordance with the demands of plaintiffs, surrendered to the latter their three stores and all of the personal property contained therein, and ceased to exist, as a going concern, on that date. Indeed, the complaint alleges that Berkley, Inc., "has now no visible means of existence, does not operate from any office, has no business of any kind to the knowledge of the plaintiff." Nor did plaintiffs dispute defendants' contention that the public records showed the dissolution

of the corporation. The complaint was filed November 23, 1938, and the trial of the cause extended over a long period of time. It is difficult to escape the conclusion that plaintiffs did not care to raise the dissolution point if they could succeed without raising it. We have concluded, however, to consider the several contentions raised by plaintiffs, based upon the supplemental defense, viz: (a) "After the defendant corporation was dissolved it was incapable of maintaining its counterclaim," (b) "Since no revivor was had no valid proceedings could be had or taken on defendant Berkley, Inc.'s counterclaim after its dissolution." (c) "The assets of the dissolved defendant corporation were a trust fund to be administered by a court of equity." "The stockholders had no right or title in or to the assets of the dissolved defendant corporation until all of its corporate debts were paid." As to these contentions it is sufficient to say that the supplemental defense did not set up in any way that there were creditors of Berkley, Inc., who had rights in any assets of the corporation, nor did it assert that any judgment entered in favor of the stockholders should be administered by the chancellor as a trust fund. It alleged the dissolution of the corporation and prayed "that said answer and counterclaim and all evidence on behalf of said Berkley, Inc., be stricken and the cause terminated insofar as Berkley, Inc. is concerned." In this court plaintiffs do not ask us to reverse the cause in order that the rights of creditors may be protected; they ask us "to reverse the decree and judgment of the trial court and to enter judgment here for the plaintiffs." The reason for this attitude is obvious, as a judgment against them and in favor of the stockholders, subject to the rights of creditors, would avail plaintiffs nothing. Plaintiffs contend that no attempt was made to bring in any of the creditors of Berkley, Inc., and that as "the assets of the dissolved defendant corporation were a trust fund to be administered by a court of equity," the trial court

could not properly enter any judgment for the benefit of the stockholders in the state of the record. As we have heretofore stated, plaintiffs, in their "supplemental defense," were not concerned about the rights of possible creditors of Berkley, Inc., and the instant point is clearly an afterthought. The chancellor ordered that the answer of defendants to the supplemental defense stand as a counterclaim on behalf of Morris L. Simons and Celestine Simons for the relief they prayed for. The decree found that the claim made in the counterclaim was an asset of Berkley, Inc., prior to its dissolution and that Morris L. Simons and Celestine Simons were the only stockholders, and that no one other than Morris L. Simons and Celestine Simons had asserted any claim to said asset. Section 94 of the Corporation Act provides that any claim against a dissolved corporation must be commenced within two years after the date of the dissolution, and the decree was not entered until a considerable time had elapsed after the two year period had expired. The law is that upon the dissolution of a corporation its assets belong to its stockholders, subject to the rights of creditors.

The decretal judgment of the Superior court of Cook county should be and it is affirmed.

DECRETAL JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

-14-

could not properly enter any judgment on the merits of the stockholders in the state of the record. As we have heretofore stated, plaintiffs, in their "unopposed" defense, were not concerned about the rights of possible creditors of Berkeley, Inc., and the instant point is clearly an "interlocutory". The chancellor ordered that the answer of defendants to the complaint be taken as a counterclaim on behalf of Morris L. Simons and Celestine Simons for the relief they prayed for. The decree found that the claim made in the counterclaim was an asset of Berkeley, Inc., prior to its dissolution and that Morris L. Simons and Celestine Simons were the only stockholders and that no one other than Morris L. Simons and Celestine Simons had asserted any claim to said asset. Section 9 of the Corporation Act provides that any claim against a dissolved corporation must be commenced within two years after the date of the dissolution, and the decree was not entered until a considerable time had elapsed after the two year period had expired. The law is that upon the dissolution of a corporation its assets belong to its stockholders, subject to the rights of creditors. The decretal judgment of the superior court of Cook

county should be and it is affirmed.

IN SENATE JANUARY 17, 1911.

Sullivan, P. J., and Wright, J., concur.

42997

322 LA. 280

MAE KENIRY,

Appellant,

v.

HARRY E. COSTELLO, Individually
and as Executor of the Last Will
and Testament and Codicil of
John M. Costello, deceased; ANNIE
MARTIN; CHARLES HECTOR; PASTOR OF
ST. ETHELREDA CATHOLIC CHURCH OF
CHICAGO, and ELIZABETH JORDAN,
Appellees.

APPEAL FROM CIRCUIT

COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order dismissing her
"Amended Count Two" to her original complaint for want of
equity.

The sole purpose of the original complaint, filed
October 29, 1942, was to have set aside the last will and
testament and codicil thereto of plaintiff's father, John M.
Costello, upon the grounds of unsound mind, dotage, fraud and
undue influence. Plaintiff abandoned that complaint and amend-
ments thereto and the cause proceeded to trial before the court
without a jury on her "Amended Count Two to the Complaint,"
filed May 3, 1943, which alleges, in substance, that plaintiff
was the daughter of the deceased, John M. Costello, and one of
his two surviving sole heirs at law; that on or about March 19,
1900, when her mother, Anna Erickson Costello, was at the point
of death, she "conveyed and set over unto the plaintiff, whose
maiden name then was May Ann Costello, and her two minor
brothers [Harry E. and Emmet], the following real estate:"
(Here follows a legal description of certain premises commonly
known as 3440 South Irving avenue); that about April 7, 1913,
plaintiff was induced by her father to convey to him her
interest in said real estate after she had entered into the
following verbal agreement with him: That in consideration
of the said conveyance by plaintiff her father agreed to make

WILLIAM HENRY

et al.

v.

HARRY E. COSTELLO, Individually
and as Executor of the last will
and testament and to all of
John H. Costello, deceased; and
JAMES H. COSTELLO, et al.;
Plaintiffs, vs.
WILLIAM HENRY, et al.;
Defendants.

THE JUDICIAL COUNCIL OF THE STATE OF CALIFORNIA

Plaintiff appeals from a certain judgment

"Amended Court No." to her credit in the

entry.

The sole purpose of the said appeal is to

October 29, 1943, was to have the said

testament and certain thereof of William Henry, et al.

Costello, upon the grounds of a certain claim, to be

under influence. Plaintiff also claims that as a result of

ments thereto and the same proceeded to trial in the court

without a jury on her "Amended Court No. to the

filed May 3, 1943, which alleges, in substance, that

was the daughter of the deceased, John H. Costello, and one of

his two surviving sons being at law; that on about

1900, when in her mother, and as a result of the same

of death, she "conveyed" and set over unto the Plaintiff, whose

maiden name then was Mary H. Costello, the

brothers [Harry H. and James H.], the following real estate:

(Here follows a legal description of certain parcels of land only

known as 3440 South Irving Avenue; that about July 7, 1943,

plaintiff was induced by her father to convey to him her

interest in said real estate after she had entered into the

following verbal agreement with him: That in consideration

of the said conveyance by plaintiff her father agreed to make

his last will and testament, in which he would provide, devise and bequeath to plaintiff an equal amount of property, or its value in cash, in addition to whatever plaintiff would be entitled to receive from him as one of his heirs at law; that in consideration of said promise and agreement and in reliance thereon, plaintiff, then known by her maiden name, Mae Costello, together with her brother Harry E. Costello, on April 7, 1913, in a joint warranty deed, duly recorded, conveyed the said property to their father; that plaintiff did not receive any consideration for said conveyance but relied upon the promise and agreement of her father that he would provide for her in his last will and testament in accordance with the conditions and terms of said verbal agreement; that her father, subsequent to the said conveyance and in compliance with the terms of said agreement, executed a will in which he included plaintiff as one of his legatees; that subsequently, disregarding his duty and obligation under the terms and conditions of said agreement and in violation thereof, he, either voluntarily or through undue influence or coercion, destroyed or revoked the said will and in lieu thereof executed his present will, dated May 20, 1936, and his codicil to the same, dated October 28, 1940, in which he expressly excluded plaintiff as one of his legatee beneficiaries; that the legatee beneficiaries under the said last will and testament of her father had and now have full and immediate knowledge of the terms and conditions of the oral agreement between plaintiff and her father; that the said legatees were donee beneficiaries, or volunteers, and have not paid any consideration for the legacies provided for them in said last will and codicil thereto; that plaintiff has no adequate or complete remedy at law, and prays that the said verbal agreement be specifically enforced and that the legatees under said last will and codicil thereto be declared by an order of the court to

be implied or constructive trustees for and in behalf of plaintiff to the extent of her interest in the estate, in accordance with the terms and conditions of her oral agreement with her father; that the executor and legatees be directed to give plaintiff an accounting and be further directed to turn over or pay to plaintiff fifty per cent of the property belonging to the said estate; that the said executor and legatees be further required and directed to pay plaintiff in addition to the fifty per centum of the estate of her father the sum of \$2,000, together with legal interest thereon; that an order be entered charging the executor and the legatees personally, as well as in their representative capacity, with plaintiff's equitable interest, and that she may have such other and further relief in the premises as equity and good conscience may require.

In defendants' answer to "Amended Count Two to the Complaint" they deny, inter alia, that there was any such agreement between plaintiff and said John M. Costello as is alleged in plaintiff's complaint, and aver that the conveyance of April 7, 1913, was supported by consideration.

Plaintiff contends that "a person may make a valid contract, either written or verbal, to dispose of his property by will in a particular way, and such contract is enforceable provided such contract possesses the usual essentials, such as valid consideration, the acceptance of its terms showing a mutual agreement thereto, and certainty and definiteness in its terms. A written or verbal agreement to bequeath or devise property, or make a will disposing of one's property in a particular way, may be specifically enforced by a court of equity." The foregoing contention states a settled rule of law in this State. In Klussman v. Wessling, 238 Ill. 568 (cited by plaintiff), the court said (pp. 571, 572):

"Per Curiam: The rule is settled in this State that a

person owning property may make a contract to dispose of it by will in a particular way, and that such a contract, when based upon sufficient consideration and clearly established, will be enforced in equity. (Oswald v. Nehls, 233 Ill. 438; Jones v. Abbott, 228 id. 34.) The theory upon which the courts proceed is to construe such an agreement (unless void under the Statute of Frauds or for other reasons) to bind the property of the testator or intestate so far as to fasten a trust on it in favor of the promisee and to enforce such trust against the heirs and personal representatives of the deceased. (Barrett v. Geisinger, 179 Ill. 240.) 'An agreement to make a certain disposition of property by last will is one which, strictly speaking, is not capable of a specific execution, - not in the party's lifetime, - because any testamentary instrument is by its nature revocable, and after his death it is no longer possible to make his last will. Yet it has been held to be within the jurisdiction of equity to do what is equivalent to a specific performance of such an agreement by requiring those upon whom the legal title has descended to convey the property in accordance with its terms.' (3 Parsons on Contracts *406.) Courts of equity look with jealousy upon the evidence offered in support of such a contract and will weigh such evidence in the most scrupulous manner. (Sloniger v. Sloniger, 161 Ill. 270.) Such contracts 'are only sustained when established by the clearest and strongest evidence.' (Dicken v. McKinley, 163 Ill. 318.) The court must have full and satisfactory proof of the agreement. It has been held that 'in this class of cases the ordinary rules which govern in actions to compel the specific performance of contracts and which furnish reasonable safeguards against fraud should be rigidly applied. These rules require the contract to be certain and definite in all its parts; that it be mutual and founded upon an adequate consideration and that it be established by the clearest and most convincing evidence.' (Edson

v. Parsons, 155 N. Y. 555.)"

Plaintiff further contends that she proved the alleged contract between her father and herself by the testimony of two elderly, impartial witnesses; that as their testimony was not contradicted, it should have been accepted by the trial court as true, and that the trial court erred in holding that plaintiff had not proved the alleged agreement by the character of proof that the law requires. This contention is based upon the testimony of Mrs. Anna Gahagan and Mrs. Martha Perren Colbert Handy McGavock.

Mrs. Gahagan testified on September 10, 1943; she stated that she was eighty-four years old; that John Costello, the decedent, was her brother, and that she (the witness) "lived right back of" her brother and they were back and forth all the time; that she had a conversation with her brother in her home in the spring of 1913; that "he said he wanted Mae to turn the property over to him, and she wouldn't, and he wanted to know if I could have any influence over her. Q. Was anything else said? A. No, nothing in particular;" that she had another conversation with her brother in his home in March, 1913, at which his second wife [who died a number of years before the trial] and plaintiff were present; that "they were arguing when I went in, and I said, 'What's up?' * * * He said he wanted Mae to turn over this property to him, and she wouldn't, that she was stubborn about it. * * * I just don't remember the whole conversation, but that was the principal part of it. Q. And when was the next conversation you had with him? A. It wasn't long after that, and I went in and they were arguing, too. The Court: Q. In what month? A. The same month. The Court: Q. What year? A. 1913. The Court: Q. Where? A. In his own house. The Court. Q. Who was present? A. His second wife and I and Mae and him. The Court: Q. What was said, and who said

it? A. I went in and asked what they were arguing about and he said the same thing, and I said to Mae, 'You might as well sign over to your father - you can trust him, and he says he will make a will right away and will allow you as much for the property as it is worth at that time, and give the rest to the heirs at the time of his death.' And I told Mae she could rely on her father, and that I did, I thought he was a man of his word. Q. Was anything else said at that conversation? A. Well, she agreed then and so did he - he made that promise right before me, to her. Q. And what was done? A. Well, I took him at his word - I never questioned him after that - he told me, of course, that he made the will all right. Q. When and where did he tell you that? A. In his own house. Q. When? A. Shortly after that. Q. And was anybody else present? A. No, I don't think there was that day. Q. Tell us what he said and what you said. A. You mean at that time I was there? Q. At the time you spoke about the will. A. Yes - he promised - he said, right in her presence and mine, that he would allow Mae the amount of the value of the property and he would also allow her a share, as heir, to his estate at the time of his death." The witness further testified that she had a conversation with her brother in the year 1936 in his home; that nobody else was present at the conversation; "Q. What did he say to you, and what did you say to him? A. I knew he didn't feel well - I said, 'Johnnie, you look worried - what is the matter?' He said, 'I don't know - Harry is bothering me and threatening me, and wants me to change the will', and I said, 'You look old enough to know your own business, Johnnie', and we didn't talk much on it after that. I asked him what he looked worried about, and he told me Harry was threatening him if he didn't make another will. Q. Where was this property located that Mae owned? A. At 3440 Irving Avenue - I lived right back, and I get them mixed up." The witness further testified that

she never saw the will which her brother told her he had executed. Upon cross-examination the following occurred: "Q. When did you go to San Francisco, California? A. My health broke down -- that is ten years since -- Q. When did you go to San Francisco, California? A. That was the time they took me there for my health. Q. When did you go to San Francisco, California? A. I am trying to think of the year. Q. Wasn't it in 1913 you went to San Francisco? A. Oh, no. Q. When did you go. A. I am trying to think when it was -- It was ten years since, and they took me there for my health. Q. When did you go to San Francisco. A. I am trying to think -- I can't remember everything. Q. You can't remember things? A. I can remember. Q. What can you remember? A. I can remember, but I am trying to think when it was. Q. What can you remember? * * * A. That is what I say -- they took me there for my health on about three days' notice. Q. When were you sick? A. I was sick for about ten years that time. Q. When were you sick? A. I am telling you about the year -- I just can't remember the year -- I can if I think back -- my boy was about eighteen then. Q. About when were you sick. A. I was sick for about ten years, so there is no direct year that I can say. The Court: Q. When did you take sick -- when did you go out to California? The Witness: A. They took me there in the middle of it. The Court: Q. When had you first taken sick? A. I will tell you, Judge, your Honor -- the best way I can explain it -- I broke down -- The Court: Q. What year? A. That is what I am trying to think, what year it was -- I can't just tell the year." The witness further testified upon cross-examination that her brother was a South Park policeman; that she did not know of any occasion when he did not keep his word, and that he bore a good reputation for honesty and veracity.

Mrs. McGavock testified that she was seventy-three years old, had resided for twenty-nine years at Lake Geneva, Wisconsin, and formerly lived near the home of the decedent; that she knew him and his children all her life; that he visited her at Lake

Geneva; that in February 1913, she had a conversation with plaintiff's father in the home of the witness; that plaintiff was present at the conversation; that "John Costello came in - he was very excited - he had his hands in his pockets - * * * Johnnie came in and said, 'I am in trouble - I want Mae to sign the property back to me, and she refused', and I said, 'That is too bad, Johnnie', and he said, 'Well, I want her to sign it back to me and she refused'. Q. Was Mae there? A. Not then - not in February." The witness further testified that the next conversation she had with Costello was in March, 1913, in her living room; that Mae was present at that conversation. "Q. State what else was said at this conversation - what you said, what he said, what Mae said and whoever else was present. A. Well, he came in and Mae was with him and he said, 'I want you to talk to Mae', and I said, 'Mae, why don't you want to turn the property over to your father?' She said, 'I don't want to turn it over, my mother left me that property for a home for me and my brother, and I am not going to turn it over', and I said, 'Mae, he is your father, you should turn it over to him', and she said, 'No, I won't', and Johnnie said, 'Mae, I will tell you what I will do - you turn this property over to me and I will make a will and I promise you your equity in the building at 3440 Irving Avenue and also fifty percent of everything I own at my death', and Mae said, 'No.'" The witness further testified that she had another conversation with Costello in June, 1913, in Costello's home. "Q. Who was present? A. Mrs. Murphy and I went over to spend the evening there, and when we got there Johnnie was all smiles, and we danced and spent a nice time, and I said, 'Johnnie, what makes you so happy?' and he said, 'I have something to tell you - Mae signed the property over to me,' and I said, 'Fine', and we passed the evening, sitting around, dancing and talking." The witness further testified that in the early fall of 1936

Costello was very ill, "and I went over to his house. Harry was there and I was there, and we were talking for quite a while, and Harry came out of the bedroom - Harry was there for quite a while - Johnnie was very sick - and I said to him, 'Johnnie,' I said, 'You are pretty sick', and he said, 'Yes, I am', and I said, 'Did you keep your promise to Mae and I and make that will?' and he said, 'Yes', and I said, 'Show it to me', and he said, 'It is in the bank', and I said, 'All right', and I sat there for a little while and then came home." On cross-examination the witness testified that Costello was an honorable man and that she never knew him to do any dishonorable thing; that Costello lost a lovely boy in 1924 or 1925. "Q. Did you ever know of a law suit filed by Mae Keniry to dispossess her father of a six-flat building? * * * The Witness: A. Yes, I heard it. Q. Do you know how the law suit terminated? A. No, I did not." Upon recross-examination the witness was interrogated as follows: "Q. Did he [Costello] tell you about a law suit that Joseph M. Keniry and Mae Keniry filed against him to take a six-flat building away from him? A. He never said anything like that at all to me. Q. Did you know about that law suit? A. Well, I knew part of it. Q. Who told you about the law suit? A. The family. * * * Q. Did you know anything about this law suit in 1924? The Witness: A. No, only that I heard them talking about it, that is all. Q. Didn't John Costello ever tell you about it? A. Yes. Q. What did he tell you about it? A. Only they were selling the building and there was a law suit about it."

Plaintiff introduced a certified copy of the last will and testament of Costello; also the codicil to the same. The will, dated May 20, 1936, contains the following:

"First: I hereby direct that all my just debts and funeral expenses be paid as promptly as possible after my death.

"Second: I hereby make the following specific legacies,

to be paid either in cash, or in securities of the market value of the separate amounts, and as promptly as may be possible:

"Two Thousand Dollars (\$2,000.00) to Mrs. Annie Martin, of Chicago, providing she survives me. In the event of her death prior to mine then this amount is hereby bequeathed to her son, John Martin;

"Two Thousand Dollars (\$2,000.00) to my nephew, Charles Hector, of Chicago;

"Five Hundred Dollars (\$500.00) to whoever may be the pastor of St. Ethelreda Catholic Church of Chicago at the time of my death, or any successor to him, who may be the pastor of this Church at the time this legacy is paid; said sum to be used by said pastor for the saying of masses for my deceased wife and deceased son and for myself.

"Third: I hereby give devise and bequeath to my son, Harry E. Costello of Chicago, all the rest, residue and remainder of my estate, real and personal property, and of whatever location or description, of which I die possessed, to be his absolutely.

"Fourth: Because of cash advances already made by me to my daughter Mrs. Mary Kenerney (sometimes called May Kenerney) I am not making any further gifts to her, or to her children in this Will, that which I have already given to her being all that I desire her or her children to receive from me or from my estate.

"Fifth: I hereby appoint my said son, Harry E. Costello, to be the Executor of this my Last Will and Testament, and I hereby direct that he be permitted to qualify and serve as such without furnishing surety bonds."

The codicil changed the amount of the legacy to said Ethelreda Church from \$500 to \$200, and further provided:

"Second: If at the date of my death, I am married to the present Mrs. Elizabeth Jordan, now living at 5922 Honore Street, Chicago, I give and bequeath to her one half of my net

to be paid either in cash, or in settlement of any other liability.

CONFIDENTIAL

10-10-68

"Thank you very much for the information. I have given it to my son."

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to be the executor of this my last will and testament, and I hereby

The council changed the amount of the legacy to said

"Second: If at the date of my death, I am married to

the present Mrs. Elizabeth Jordan, now living at 7222 Monroe

personal estate after paying all debts and funeral expenses. If not married to her I give and bequeath to her the sum of \$500.00 J. M. C. Witness L.A.B., H.G."

Plaintiff also introduced in evidence a certified copy of a warranty deed filed for record June 2, 1913. The deed is dated April 7, 1913, and is signed by "May Ann Costello" (plaintiff) and "Harry Edward Costello," and it conveys to John M. Costello the premises in question. Plaintiff also introduced a certificate of the Recorder of Cook county certifying that on May 10, 1924, John M. Costello and Margaret Costello, his wife, conveyed to William C. Jaap and Emilia Jaap, his wife, the premises in question in consideration of \$5,000 paid by the said Jaaps to Costello and his wife. It appears that when the first wife of Costello, the mother of plaintiff, Harry and Emmet, died, the property in question was in her name, and that she left no will. Harry E. Costello, testifying for defendants, stated that about April 9, 1913, his father stated to plaintiff and himself at their home: "Well, children, if ever I want to sell this house you are part owner of it, therefore if you want to sell the house to me, I will pay you for your interest in it. * * * Inasmuch as there isn't any will he would have to have the children sell the house to him;" that the father stated that is what the lawyer told him; that plaintiff was about to be married at the time; that the father told them that as their mother did not leave a will the children were part owners of the property at 3440 South Irving Avenue and that if they wanted to sell the property they would have to sign it over to him; that his sister and he said, "Well, dad, whatever is necessary;" that the father said he would pay each of them, for their interest in the property, \$400. The witness further testified that the property was worth, originally, \$1,400 but that the father put in a brick foundation and other improvements that enhanced the value of the property at that time to

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have to sign it over to him; J. W. O. witness J. W. O. witness J. W. O. witness J. W. O. witness J. W. O. witness
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further testified that the property was worth, J. W. O. witness J. W. O. witness J. W. O. witness
and that the father put in a brick foundation and other improve-
ments that enhanced the value of the property at that time to

about \$1,900; that he and his sister went to Attorney Willis's office with the father and there the father explained the situation to Mr. Willis and the latter drew up the deed conveying the property to the father; that he and plaintiff then and there signed the deed; that at the time they signed the deed Emmet was still living and was then fourteen years old; that after the deed was signed the father took the witness and plaintiff to the Illinois bank at LaSalle and Jackson and paid each of them \$400 in currency. Plaintiff then testified that she signed the warranty deed at their home, around April, 1913; that Harry Costello was not present at the time but his signature was upon the deed; that her father handed the deed to her and said, "Harry signed, you might as well sign now, Mae," and she signed. She denied that she went with her father and brother to a lawyer's office and there signed the deed, and denied that she received \$400 or any consideration from her father for signing the deed. Attorney Willis, as a notary public, certifies that plaintiff and Harry appeared before him and acknowledged that they signed, sealed and delivered the said instrument (the deed in question) as their free and voluntary act, etc. Emmet Costello did not die until 1924, 1925, or 1926, at which time he was over twenty-five years of age. The record does not show any conveyance by him of his interest in the property to the father, but the record does show that Costello did not sell the property until May 10, 1924.

In passing upon plaintiff's contention that she proved the alleged agreement by the kind of proof that the law requires, we must consider, in addition to the testimony of Mrs. Gahagan and Mrs. McGaveock, certain other facts and circumstances shown by the evidence and the record. The sole purpose of the original complaint, filed October 29, 1942, was to have set aside the last will and testament of plaintiff's father and codicil thereto, upon the grounds of unsound mind, dotage, fraud and undue influence. A

number of amendments were filed to the original complaint, but they were intended to cure defects in the original complaint and they did not purport to change, in any way, the purpose of that complaint. When the original complaint was filed and the several amendments were made thereto, plaintiff was represented by one of the leading law firms of Chicago. On April 7, 1943, that firm was allowed to withdraw as attorneys for plaintiff. On April 14, 1943, plaintiff's present attorney entered his appearance, and on April 16, 1943, the "Amendment to the Complaint Count Two" was filed, in which pleading the instant claim of plaintiff was first asserted. It is difficult to believe that if plaintiff had stated to her original lawyers the facts upon which her present claim is based, that they would not have asserted the claim by apt pleadings. Defendants strenuously insist that plaintiff's present claim is a mere afterthought. The testimony of Mrs. Gahagan and Mrs. McGavock indicates that they understood from what was said in the alleged conversations that the mother had conveyed the property in question to plaintiff. Mrs. McGavock testified that the deceased said that he wanted Mae to sign the property back to him and that she refused; that she (the witness) said to plaintiff, "Mae, why don't you want to turn the property over to your father?" to which plaintiff replied, "I don't want to turn it over, my mother left me that property for a home for me and my brother, and I am not going to turn it over." Mrs. Gahagan testified that the property that Mae owned was located at 3440 Irving avenue; that the deceased said to the witness that "he wanted Mae to turn the property over to him, and she wouldn't." Amended Count Two alleges that the mother conveyed the property to plaintiff "and her two minor brothers," but the evidence tends to show that the mother, who owned the property, died intestate, leaving^u three children, plaintiff, Harry and Emmet, her heirs at law. As plaintiff had only a one-third equity in the property

and as Harry and Emmet were then minors, Emmet being only fourteen years of age at the time, the question naturally arises why the father should agree to give plaintiff, in his will, the amount of the value of the property in question and also her share as an heir at law. Indeed, Mrs. McGavock testified that Costello stated to plaintiff that he would promise plaintiff her "equity in the building at 3440 Irving Avenue and also fifty percent of everything I own at my death." But Mrs. Gahagan testified that Costello said that "he would allow Mae the amount of the value of the property and he would also allow her a share, as heir, to his estate at the time of his death." In considering the testimony of Mrs. Gahagan and Mrs. McGavock it must be borne in mind that between the time of the alleged conversations and the time that they testified in the instant proceedings thirty and one-half years had elapsed. It would be idle to argue that the testimony of Mrs. Gahagan is sufficient to make out a case for plaintiff under the rules stated in the Klussman case. Her advanced age, the fact that she was broken down in health for the ten years prior to the time that she testified, and the further fact that she showed upon examination by the chancellor that her memory was faulty, make it highly improbable that she could remember clearly statements made almost one-third of a century before the time that she testified. In considering the testimony of Mrs. McGavock we find that "Amended Count Two to the Complaint" alleges that plaintiff conveyed her interest in the real estate in question upon the promise of her father that he would bequeath to her in his will an equal amount of property or its value in cash, in addition to whatever she would be entitled to receive from him as one of his heirs at law; and that at the time of the hearing plaintiff's counsel stated to the court that the substance of the verbal agreement was that he [Costello] would devise or bequeath to her [plaintiff] fifty per cent of his

and as Harry and Janet were then minors, Janet's one-fourth
 teen years of age at the time, the question naturally arises
 why the father should agree to give in his will, in his will,
 the amount of the value of the property in question and also
 her share as an heir at law. Indeed, Mrs. Costello testified
 that Costello stated to plaintiff that he would, however, retain
 fifty percent of everything I own, I own, I own, I own, I own, I own,
 testified that Costello said that she would retain the amount
 of the value of the property, I own, I own, I own, I own, I own,
 as heir, to his estate at the time of his death, in testimony
 the testimony of Mrs. Costello and Mrs. Costello, of which it was to be borne
 in mind that between the time of the alleged conversation and
 the time that they testified in the instant proceeding, thirty
 and one-half years had elapsed. It will be seen to appear that
 the testimony of Mrs. Costello is sufficient to take out a case
 for plaintiff under the rules stated in the preceding cases. The
 advanced age, the fact that she was blind and in her fifth
 the ten years prior to the time that she testified, and the
 further fact that she showed upon examination by the physician
 that her memory was faulty, make it highly improbable that she
 could remember clearly, statements made almost one-third of a
 century before the time that she testified. In considering the
 testimony of Mrs. Costello, it is found that "A. J. Costello" to be
 the "Complainant" alleged that plaintiff conveyed her interest in
 the real estate in question upon the promise of her father that
 he would bequeath to her in his will an equal amount of property
 or its value in cash, in addition to whatever she would be entitled
 to receive from him as one of his heirs at law; and that at the
 onset of the hearing plaintiff's counsel stated to the court that
 "the substance of the verbal agreement was that he [Costello] would
 give, devise or bequeath to her [plaintiff] fifty percent of his

property, or whatever she would be entitled to receive by being his heir at law, and in addition thereto the value of the property conveyed. That is the subject matter of the entire litigation here." Mrs. McGavock's testimony does not sustain the said allegations of the complaint nor the statement made by plaintiff's counsel to the court as to plaintiff's theory of fact. Mrs. McGavock testified that plaintiff, in a positive manner, twice refused to accept the alleged offer made by the father to her, and while this witness also testified that sometime later Costello stated to her, "I have something to tell you - Mae signed the property over to me," nevertheless, the witness does not pretend to know the actual circumstances under which plaintiff finally signed the property over to her father. Plaintiff testified that she signed the deed in their home, around April, 1913; that her brother's signature was then on it and that when her father handed the deed to her he said, "Harry signed, you might as well sign now, Mae," and she signed. In passing upon the instant contention of plaintiff we must also take into consideration the fourth paragraph of the will of Costello, wherein he gives his reasons why he is not leaving anything to plaintiff or her children, and in this connection it must be noted that plaintiff abandoned her effort to have the will set aside.

Viewing the record in this case in the light of the rules laid down in the Klussman case, supra, we are entirely satisfied that the chancellor was justified in dismissing plaintiff's original complaint and the amendments thereto for want of equity. No estate would be safe if claims like the instant one were sustained.

The decretal order of the Circuit court of Cook county is affirmed.

DECRETAL ORDER AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

property, or whatever she would be entitled to receive by
being his heir at law, and in addition thereto the value of
the property conveyed. The defendant's counsel in the entire
litigation here. The defendant's counsel has been in the
said allegations of the complaint and the answer to the complaint
this counsel to the court as to the facts of the case. The
defendant testified that defendant, the defendant's counsel, and
testified to accept the alleged facts of the case, and
while this witness also testified that the defendant's
stated to her, "I have a feeling to tell you - I don't think the
property ever to me," defendant, the defendant's counsel, not pretend
to know the actual circumstances which existed. Finally
signed the property ever to her. The defendant testified that
she signed the deed in chief, and the defendant's counsel testified
brother's signature was then on the deed. The defendant's counsel
the deed to her he said, "I don't think you should sign it
now, now," and she signed. In signing on the deed the defendant
of plaintiff we must also take into consideration the fact that
graph of the will of the defendant, wherein he gives his reasons why
he is not leaving anything to the defendant or his children, and in
this connection it must be noted that the defendant's counsel has
effort to have the will set aside.

Viewing the matter in this light and in the light of the rules
laid down in the plaintiff's case, which we have previously said were
that the chain of title was justified in assuming plaintiff's original
complaint and the amendments thereto for want of equity. No equity
would be safe if claims like the instant one were sustained.

The decretal order of the Circuit Court of Cook County is
affirmed.

ROBERT L. ORR, Clerk.

43078

APPLE-COLE CO. et al.,
Appellants,

v.

FRANK SHACKEL et al.,
Appellees.

32-1A-230

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Apple-Cole Co., a corporation, and A. C. Apple, individually, sued defendants, Frank Shackel, Louis Shackel, Anton A. Shackel, Raymond J. Shackel and Lester E. Shackel, to recover commissions alleged to be due them for services rendered as brokers, pursuant to a written agreement with defendants to procure a purchaser who was ready, willing and able to purchase the real estate and business of the Thor-Shackel Manufacturing Company at a price fixed by defendants. The case was tried by the court without a jury and at the conclusion of plaintiffs' evidence the court sustained defendants' oral motion to find for them. Plaintiffs appeal from the judgment entered upon the finding.

On March 9, 1943, plaintiffs were licensed general brokers and defendants were engaged in the horse-radish business, under the name of Thor-Shackel Manufacturing Company. On that date plaintiffs and defendants entered into a written agreement whereby plaintiffs were given the exclusive right to find a purchaser, at a price of \$16,000 cash, "for all of the fixed assets, real estate, good will, trade name of business known as the Thor-Shackel Manufacturing Co. located at 163 N. Aberdeen St., Chicago, and as per Bal. Sheet as of Dec. 31, 1942 - plus inventory on hand to be paid for extra at cost - (cash and receivables not included in sale) all to be delivered free and clear - title to be conveyed by Bill of Sale and Warranty Deed or delivery of all of the capital stock which ever way buyer

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REPORT OF J. L. ...

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100-443887-100

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CONFIDENTIAL

the court without a jury and to the conclusion that the defendant is guilty.

Drill on rotation from 'down' to 'up' position and sensitive

not to be used for any other purpose than the one for which it was intended.

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1. I am not a member of the Communist Party, nor do I have any contact with any member of the Communist Party.

projects and defendants were arrested in the 1960s - 1970s.

Jointly, the Commission and the Council have decided to amend the

On 10/10/1963, the following information was received from the

in fact of their evidence and given every artificial advantage

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assets, real estate, goods will, funds in or, business known

as the Thor-Black Manufacturing Co. located at 107 "A" Bergen

It is a pleasure to have you here today.

Inventory on hand to be paid for extra at cost - (cash and re-

revenues not included in sales) all to be delivered free and

least - title to be conveyed by bill of sale and Warranty Deed

on delivery of all of the capital stock which every boy buyer

prefers -." The contract further provides that "the Owner agrees to pay the Broker a commission of 10% in cash payable at the time an agreement to buy and sell said business is made, if said business is sold during the continuance of this agreement by the Owner, Broker, or by any other parties, or if it is sold any time within one (1) year after cancellation to any one to whom the business was made known by the Broker directly or indirectly. * * * Minimum commission \$1500.00." It further provides that the agreement might be terminated "after one months from the date hereof, by giving the Broker ten (10) days' notice in writing * * *." Albert G. Apple, one of the plaintiffs, testified that on or about March 28, 1943, the Thor-Shackel Manufacturing Company sent plaintiffs a letter terminating the contract, but the letter was not introduced in evidence.

Plaintiffs' evidence shows that after the making of the contract they endeavored to find a purchaser of defendants' business and real estate and that through an advertisement they ran in the Chicago Tribune they met one A. E. Kasselberg, who became interested in the matter. Mr. Apple and Mr. Harris, of plaintiffs' firm, had several conferences with Kasselberg and furnished him with an audit of the business of defendants for the year ending December 31, 1942, which audit plaintiffs obtained from defendants. Kasselberg obtained a report of the business of defendants from Dun & Bradstreet. Kasselberg testified that he had been paralyzed for eight years, that he was unable to walk, and "I operate the business by sitting at my desk and dictating letters and making telephone calls." He was then engaged in the golf ball business and was still engaged in that business at the time of the trial, but in 1943 his business "was going bad and I was looking for another business to go into." He testified that he had never been in the horse-radish business and knew nothing about that business; that he

... The contract further provides that the Owner
agrees to pay the Broker a commission of 10% in cash payable
at the time an agreement to buy and sell said business is made,
if said business is sold during the commission of this agree-
ment by the Owner, Broker, or by any other person, or if it is
sold any time within one (1) year after the date of the agree-
ment to whom the business was sold known by the Broker, or if it is
indirectly, or by any other person, or by any other person, or if it is
provided that the agreement shall be terminated after one
month from the date thereof, by giving the Broker ten (10) days
notice in writing to the Owner, or to the Broker, or to the
attorney, testifies that in or about 1945, the Owner
Shackel Manufacturing Company sent him a letter terminating
the contract, but the letter was not introduced in evidence.
The witness' evidence shows that after the making of the
contract they continued to find a person or persons, but
ness and real estate and that he is an owner and that he
in the Chicago Tribune they were ... , testifies, who became
interested in the matter, ... of ...
attest, first, had several conversations with ... and ...
nished him with an audit of the ... of ... for the
year ending December 31, 1945, which audit ... contained
from defendants. ... obtained a report of the business
of defendants from Dan ... testifies, testifies that
he had been paralyzed for eight years, that he was unable to
walk, and "I operate the business by sitting at my desk and
dictating letters and making telephone calls." He was then
engaged in the golf ball business and was still engaged in
that business at the time of the trial, but in 1945 his busi-
ness "was going bad and I was looking for another business to
go into." He testified that he had never been in the horse-
racing business and knew nothing about that business; that he

never saw the building or business of defendants. As to the location of defendants' business, he testified that Harris told him that it was located in the "Market district. I think it was around Aberdeen or somewhere around there." He further testified that after Apple had made an appointment with one of the Shackels to show Kasselberg's lawyer, Rashbaum, and his auditor, Appelman, "through the thing so they could see everything they wanted to," he told his lawyer and auditor that he would like to have them go and look at the business, and he told Mr. Apple that he was going to have his attorney go over there and look at the business and if his attorney was satisfied with the report and audit he wanted to buy it; that he intended to have Bernard Newberger manage the business if he bought it and he arranged with Apple to have Newberger go over to defendants' premises with Rashbaum and Appelman to "look at the business;" that Rashbaum, Appelman and Newberger went to defendants' place "to inspect the premises about Tuesday the 13th of April, 1943;" that he instructed Rashbaum to buy the business "if it justified the audit and the report," and he "drew the check to - put up the money to bind it [the contract]" and Rashbaum was to bring the contract to him, and "he would sign it." Leonard B. Harris testified that Mr. Apple made an appointment with Frank Shackel for Tuesday, April 13, at 2 o'clock p.m., and that he was present at that time at defendants' premises, together with Appelman, Newberger and Rashbaum; that all of these parties arrived at the premises at the same time but that Louis Shackel closed the door of the premises and said, "The business isn't for sale." Harris further testified that Kasselberg told him that his lawyer had full power to negotiate. Maxwell J. Rashbaum, Kasselberg's attorney, testified that Shackel stated to them, "Did you come here about the purchase of this place of business?" that he said, "Yes;" that Shackel said, "Well, the place is sold. You

never saw the building on business of defendant. As to the location of defendant's business, he testified that Morris told him that it was located in the "Market district". I think it was around between or somewhere around there." He further testified that after Apple had made an appointment with one of the defendants to show Kesselberg's lawyer, Kesselberg, and his auditor, Appleman, "telling the thing as they would see everything they wanted to," he told his lawyer and auditor that he would like to have them go and look at the business, and he told Mr. Apple that he was going to have the security go over there and look at the business and if the security was satisfied with the report and audit he would go with it; that he intended to have Bernard Newberger manage the business if he bought it and he arranged with Apple to have Newberger go over to defendant's premises with Kesselberg and Appleman to "look at the business"; that Kesselberg, Appleman and Newberger went to defendant's place "to inspect the premises about Tuesday, the 17th of April, 1943"; that he instructed Kesselberg to buy the business "if it satisfied the audit and the report," and he "saw the check for -- put up the money to bind it [the contract]" and Kesselberg was to bring the contract to him, and "he would sign it." Bernard B. Morris testified that Mr. Apple made an appointment with Frank Shackel for Tuesday, April 13, at 2 o'clock p.m., and that he was present at that time at defendant's premises, together with Appleman, Newberger and Kesselberg; that all of these parties arrived at the premises at the same time and that Louis Shackel closed the door of the premises and said, "The business isn't for sale," Morris further testified that Kesselberg told him that his lawyer had full power to negotiate; Maxwell T. Kesselberg, Kesselberg's attorney, testified that Shackel stated to them, "Did you come here about the purchase of this place of business?" that he said, "Yes"; that Shackel said, "Well, the place is sold. You

can't come in," and Shackel barred the entrance and they all walked away. Defendants concede that the business had not been sold and that they were still operating it at the time of the trial. Neither plaintiffs nor Kasselberg made any further inquiries of defendants nor did they request any explanation of defendants' conduct. Kasselberg never entered into any contract for the purchase of the property of defendants mentioned in the agreement and he never placed a deposit for the purchase of the same. He never met any of the defendants.

Plaintiffs contend: "(a) A motion to find for the defendants should be denied, if there is any evidence in the record to prove the facts necessary to entitle plaintiffs to a judgment. (b) On a motion to find for the defendants, plaintiffs are entitled to the benefit of all the evidence in its most favorable aspect, together with all reasonable inferences to be drawn therefrom. (c) A broker's right to commission is complete when he produces a purchaser who is ready, willing and able to purchase a business at a price fixed by the seller, although no sale is made because of the fault of the seller. (d) Seller cannot defeat the broker's right to compensation by refusing to enter into a contract with a purchaser produced by the broker. (e) Where plaintiffs make a prima facie case it is error to sustain a motion to find for the defendants, and to enter a judgment against the plaintiffs." Defendants concede that all of the foregoing principles of law are well established.

The parties agree that the sole question that was presented to the trial court upon the motion to find for defendants was: Was there any evidence introduced by plaintiff that fairly tended to prove that Kasselberg at the time in question was ready, willing and able to purchase the business of defendants at the price fixed by them in their agreement with plaintiffs.

can't come in," and Michael turned the corner and they all
walked away. Defendants concede that the business had not been
sold and that they were still operating it at the time of the
trial. Neither plaintiff's nor defendant's evidence, taken
individually or defendant nor did they present any explanation
of defendant's conduct. Masselberg never referred to any con-
tract for the purchase of the property of defendant's mentioned
in the agreement and he never placed a deposit for the purchase
of the same. He never met any of the defendants.

Plaintiffs contend: "(a) A motion to find for the defend-
ants should be denied, if there is any evidence in the record to
prove the facts necessary to entitle plaintiffs to a judgment.
(b) On a motion to find for the defendants, plaintiffs are
entitled to the benefit of all the evidence in the most favor-
able aspect, together with all reasonable inferences to be drawn
therefrom. (c) A broker's right to a commission is complete when
he procures a purchaser who is ready, able and willing to pur-
chase a business at a price fixed by the seller, although no
sale is made because of the fault of the seller. (d) Seller
cannot defeat the broker's right to a commission by refusing to
enter into a contract with a purchaser procured by the broker.
(e) Here, plaintiffs make a prima facie case by their evidence
to sustain a motion to find for the defendants, and to obtain a
judgment against the plaintiffs." Defendants concede that all
of the foregoing principles of law are well established.

The parties agree that the sole question that was
presented to the trial court upon the motion to find for defend-
ants was: Was there any evidence introduced by plaintiffs that
fairly tended to prove that Masselberg at the time in question
was ready, willing and able to purchase the business of defend-
ants at the price fixed by them in their agreement with plain-

The trial judge, in the opinion he rendered in deciding the motion to find for defendants, showed a full knowledge of the salient facts and of the law that bears upon the facts, and we are satisfied that his finding for defendants was fully justified under the undisputed facts and the law.

In our opinion, certain questions and answers settle the answer that we must make to the sole question presented to us. When Kasselberg was being examined in direct his counsel was examining him as to what conclusion he reached after he had made a study of the audit of defendants' business, and Kasselberg stated: "I reached the conclusion that after I found out the audit - if the audit was verified through Dun & Bradstreet report and through other investigations I would buy the building." He further testified: "I told Mr. Apple I was going to have my attorney to go over there and look at the business, and if he was satisfied with the report and audit, I wanted to buy it. * * * I explained to Mr. Newberger that I planned on buying this business, and I needed somebody to help me run it in the event the purchase went through * * * I told him Mr. Apple was making a date for Mr. Rashbaum and Mr. Appelman to go over and look at this business, and I would like to have him to go along with them." Upon cross-examination the following occurred: "Q. Now then, you say^{that} you would have bought this business after you had made an examination of the audit, is that correct? A. I would have bought this business after the audit had been verified - correct. Q. You would not have signed a contract until all of those things were done, in - A. That is correct. Q. Did Mr. Apple ever submit a contract to you to sign? A. No. Q. Never? A. No. Q. Did he ever ask you to sign a contract? A. No. Q. Will you tell me why you didn't buy this business? A. Because they refused to allow my attorney and my auditor access to the premises to verify the report and the audit." Harris, an employee of

The trial judge, in the opinion he rendered in deciding the motion to bind for defendants, showed a full knowledge of the salient facts and of the law and based upon the facts, and we are satisfied that his finding for defendants was fully justified under the undisputed facts in the law.

In our opinion, certain questions and answers settle the answer that we must make to the question presented to us. When Kasselberg was being examined in the trial court, he was examining him as to what conclusion he reached after he had made a study of the audit of defendants' business, and Kasselberg stated: "I reached the conclusion that after I found out the audit - if the audit was verified through the business report and through other investigations I would buy the building." He further testified: "I told Mr. Apple I was going to have my attorney to go over there and look at the business, and if he was satisfied with the report and audit, I wanted to buy it. * * * I explained to Mr. Kasselberg that I planned on buying this business, and I needed somebody to help me out in the event the purchase went through. I told Mr. Apple was making a date for Mr. Kasselberg and Mr. Apple to go over and look at this business, and I would like to have him to go along with them." Upon cross-examination the following occurred: "Now then, you say ^{that} you would have bought this business after you had made an examination of the audit, is that correct? A. I would have bought this business after the audit had been verified correct. Q. You would not have signed a contract until all of those things were done, is - A. That is correct. Q. And Mr. Apple ever submit a contract to you to sign? A. No, I never. A. No, Q. Did he ever ask you to sign a contract? A. No, Q. Will you tell me why you didn't buy this business? A. Because they refused to allow my attorney and my auditor access to the premises to verify the report and the audit." Harris, an employee of

plaintiffs, testified: "He [Kasselberg] told me he was going to discuss the matter with his lawyer and his auditor and a man that he told me would handle the business if he purchased it." The witness further testified: "I would say that was the morning of April 9 - about April 9, that is, I went there and it was then Mr. Kasselberg told me to see when I could arrange an appointment to show his representatives through the place of business;" that Kasselberg told him "that he was sending his attorney Mr. Rashbaum; that he had full power to negotiate and he would be prepared and he would transact his business for him just as though he was doing business with Mr. Kasselberg." Mr. Rashbaum, Kasselberg's attorney, upon direct examination testified: "Q. What did you do with reference to investigating this audit? A. I went to the place business of Thor-Shackel on April 13, 1943 to personally investigate." In the examination of Mr. Apple we find the following: "Q. What did you say. Please tell the court. A. I told Frank Shackel that Mr. Kasselberg went all through the investigations on his own accord and found the business to be very attractive and he was ready to close the deal and all he wanted to do was send his accountant and his lawyer over and if the figure was all right - they wanted to make a few checks, I don't know just what they wanted to verify." Upon cross-examination the witness further testified: "Mr. Ramlose [attorney for defendants]: Q. Did you ever submit a contract to the Kasselberg people to sign with reference to this transaction? Mr. Rizzio [attorney for plaintiffs]: Objection. The Court: Overruled. Mr. Apple: A. No. Mr. Ramlose: Q. Did you at any time introduce Mr. Kasselberg or any agent in his behalf to any one of the defendants? A. We never got that far. Q. Did you? A. No. Q. Did you at any time ask Mr. Kasselberg to place a deposit on the purchase of this business? A. Yes. Q. Did he do it? A. He said as soon as his attorney got over there and

Q. Did you at any time ask Mr. Kasselberg to place a deposit on the purchase of this business? A. Yes, Q. Did he

A. No. Q. Did you at any time ask Mr. Kasselberg to place one of the defendants? A. We never got that far. Q. Did you

time introduce Mr. Kasselberg; or any agent in his behalf to any overruling. Mr. Apple: A. No. Mr. Helms: Q. Did you at any

Mr. Kassa [Attorney for plaintiff]: objection. The court:

the Kasselberg people to sign with reference to this transaction?

[Attorney for defendant]: Q. If you ever admitted a contract to cross-examination the witness further testified: "Yes, because

few checks, I don't know what they were used to verify." Upon

over and if the figure was all right - they wanted to make a

and all he wanted to do was send him a check and give him a year

ness to be very attentive and he would go along the way.

through the investigations on his own account and found the bank-

the court. A. I told Frank what they said. Kasselberg went all

Apple we find the following: "I told you my. Please tell

19, 1943 to personally investigate. In the opinion of Mr.

edit? A. I went to the place where it was located on April

ried: "Q. What did you do with the money in investigating this

Helmans, Kasselberg's attorney, who is now in the state-

just as though he was doing the same thing. Mr. Helms:

he would be prepared and he would discuss it with me for him

attorney Mr. Helmans; that he had full power to negotiate and

"business"; that Kasselberg told him "it is not in the

appointment to show this representative a picture of the

was then Mr. Kasselberg told me to get away from the building

morning of April 9 - about 8:00 AM. He said: "The first day is

it." The witness further testified: "I told you my. Please tell

man that he told me would handle the matter. I am going to see

to discuss the matter with him. I want to see him and a

plaintiffs, testified: "He said: 'I told you my. Please tell

verified a few things he would close the deal himself but he didn't need us to do that. Mr. Rashbaum was supposed to close the deal for Mr. Kasselberg and as I understood it they were going to - they planned on doing it that same day if everything was all right." Upon the direct examination of Harry Appelman, Kasselberg's accountant, the following occurred: "Q. When did you go to investigate the place? A. It was on Tuesday afternoon in April - about the middle of April at about 2:00 o'clock."

Bernard Newberger testified that he was present at the time of the alleged occurrence at defendants' premises on April 13, 1943. Upon his direct examination the following occurred: "And will you tell the court what conversation took place and who spoke? A. I asked the man to show us through the building as well as the business. Q. This man came from the building? A. He was standing right in front in the areaway, sir. Q. And what did you say to him and what did he say to you? A. He asked me - Q. What did you say and what did he say? A. I said that we came to look at the building and the business, that we were there to negotiate for the purchase of the building and business. Q. Yes? A. He told us then that the building-it was all sold and he shut the door on us - the building and business was sold and he shut the door on us."

Plaintiffs, in support of their contention that they made out a prima facie case that Kasselberg was ready, willing and able to purchase defendants' business at the price fixed by defendants, cite the following testimony: At the very close of Kasselberg's direct testimony the following occurred: "Q. * * * Mr. Kasselberg, were you, on April 13th, 1943, ready, willing and able to purchase the business of Thor-Shackel Manufacturing Company located at 164 [163] N. Aberdeen Street, Chicago, Illinois, for the price of \$16,000.00 cash, including all fixed assets, real estate, and good will and trade-name, plus the inventory of the stock, the horseradish, excluding accounts receivable and cash on hand? A.

verified a few things as to how close the deal was but he didn't need us to do that. Mr. Kasselberg is supposed to close the deal for Mr. Kasselberg and as I understood it they were going to - they planned on doing it but I am not sure if everything was all right. Upon the direct examination of Mr. Kasselberg, the following occurred: "I was with you to investigate the alleged occurrence of April 13, 1943, in April - about the 13th of April at about 10:00 AM. Bernard Newberger testified that he was present at the time of the alleged occurrence at the time of the alleged occurrence. Upon his direct examination the following occurred: "I will tell you tell the court what occurred from the time we spoke to A. I asked the man to show us the building and he said it was the business. This man came from the building and he was of the right in front in the hallway, etc. I did not say to him and what did he say to you? He said he - I did not say and what did he say? A. I said that he came to look at the building and the business, that we were there to negotiate for the purchase of the building and business. I said to him then that the building-it was all sold and he said the deal was on the building and business was sold and he said the deal was on the building. In support of their contention that they made out a written false case that Kasselberg was ready, willing and able to purchase defendant's business, the prices listed by defendant, cite the following testimony: At the very close of Kasselberg's direct testimony the following occurred: "I, Mr. Kasselberg, were you, on April 13th, 1943, ready, willing and able to purchase the business of Thor-Mackey Manufacturing Company located at 164 [163] W. Aberdeen Street, Chicago, Illinois, for the price of \$10,000.00 cash, including all fixed assets, real estate, and good will and trade-name, plus the inventory of the stock, the foregoing, excluding accounts receivable and cash on hand? A.

Yes, sir." Plaintiffs contend that the foregoing testimony was not a mere conclusion of the witness but a statement of fact and that it was sufficient, alone, to make out a prima facie case. They cite, in support of this contention, Pusey v. Varland, 224 Ill. App. 35, 39. After considering that case we are, nevertheless, of the opinion that the answer amounts to no more than a conclusion of the witness. Whether or not a party is ready, willing and able to consummate a deal must be determined from the facts and the law that bears upon the facts. In any event, the answer has no probative force, in the light of the undisputed facts in the case, that show, in our judgment, that Kasselberg was not ready, willing and able to consummate the deal within the meaning of the law that bears upon the undisputed facts.

Plaintiffs urge that the evidence shows that the sole reason advanced by defendants for not allowing Rashbaum et al. to view the premises was that the business was already sold and that this conduct of defendants prevented Kasselberg from purchasing the property and business of defendants. It is a sufficient answer to this contention to say that plaintiffs, in order to make out a prima facie case, were bound to show that they procured a purchaser ready, willing and able to purchase, and the parties agree that this is the sole issue in the case.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

43087

CHARLES WACHTA, ROBERT L.
STAUBER and IRVING HEINZEL,

v.

RUSSELL V. JUDSON, who appears
herein and is also known as
R. V. JUDSON, GUILFORD B.
DAVIS, R. N. NESSLER and
HENRY KRAEBBER.

ROBERT L. STAUBER and IRVING
HEINZEL,

Appellants,

v.

RUSSELL V. JUDSON, who appears
herein and is also known as
R. V. JUDSON, GUILFORD B.
DAVIS and HENRY KRAEBBER,

Appellees.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

3241A.231

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An appeal from a judgment order dismissing plaintiffs' complaint for want of equity.

While the complaint is brought by plaintiffs as stockholders of the Photometric Products Corporation and it is based upon alleged rights of that corporation, the corporation was not made a party to the proceedings. The Photometric Products Corporation (hereinafter called Photometric) has 42,000 shares of stock outstanding, of which Wachta, plaintiff, owns 100 shares, Stauber 50 shares, and Heinzl 25 shares. Wachta did not join in this appeal. The complaint was brought on behalf of plaintiffs and the other stockholders, who numbered 450, but no other stockholders joined in the proceeding. The two appellants represent 1/560 of the outstanding stock.

The complaint is a lengthy one and for the sake of brevity we will adopt appellants' statement as to its salient features: "Charles Wachta, Robert L. Stauber and

CHARLES WACHTE, ROBERT A.
STAMBER and IRVING KATZ

v.

RUSSELL V. JUDSON, who appears
herein and is also known as
R. V. JUDSON, GUILLON, J.
DAVIS, R. W. WILSON and
HENRY KATZBERG.

ROBERT A. STAMBER and IRVING
KATZ

v.

RUSSELL V. JUDSON, who appears
herein and is also known as
R. V. JUDSON, GUILLON, J.
DAVIS and HENRY KATZBERG.

MR. JUSTICE BREWER delivered the opinion of the court.
An appeal from a judgment of the District Court of the District of Columbia.

This complaint for rent of a building.

While the complaint is entitled to be taken as a complaint for rent of a building.

stockholders of the Photometric Corporation, and it is based upon alleged rights of such stockholders, the corporation was not made a party to the proceedings. The Photometric Corporation is a corporation organized under the laws of the District of Columbia.

Photometric) has 42,000 shares of stock outstanding, of which Wachter, plaintiff, owns 10 shares, and 30 shares, and Haines 25 shares. Wachter did not join in this suit.

The complaint was brought on behalf of 11 plaintiffs and two other stockholders, who numbered 470, but no other stockholders joined in the proceeding. The two plaintiffs represent 1/500 of the outstanding stock.

The complaint is a lengthy one and for the sake of brevity we will adopt appellants' statement as to its salient features: "Charles Wachter, Robert A. Stamper and

Irving Heinzel there complained, as stockholders of the Photometric Products Corporation, against Guilford B. Davis, R. W. Nessler and Henry Kraebber, officers and directors of said corporation, and Russell V. Judson, and sought injunctive relief restraining the defendants from destroying records and evidences of ownership in patents and patent papers belonging to said corporation, or from the removal of same beyond the jurisdiction of the court; and from proceeding further in the trial of a lawsuit pending in the United States District Court for the Southern District of New York, entitled: Photometric Products Corporation v. Albert A. Radtke, et al., No. 9-129; and from attempting, through it, to transfer valuable assets out of the ownership and control of Photometric Products Corporation, eighty-five percent thereof to the said Judson, portions to other persons and the balance into the hands of said defendants as trustees for stockholders, and from liquidating said corporation; and further asked the cancellation of an agreement dated April 10, 1939, executed by the said Judson and defendants under which the said Judson claimed the right to maintain said litigation and obtain eighty-five per cent of the assets of said corporation and give ~~to~~ to the defendants, as trustees for the stockholders, fifteen percent thereof, and by other means further dissipate its assets." The agreement referred to in the foregoing statement, and which forms the basis of the suit, was made a part of the complaint. It reads as follows:

"Chicago, Illinois,
"April 10, 1939.

"AGREEMENT

"Whereas R. V. Judson is the owner of certain former assets of Photometric Products Corporation.

"Whereas R. V. Judson is also a judgment creditor of Photometric Products Corporation.

"Whereas R. V. Judson believes that some remaining assets and rights of Action are not salable property to a judgment creditor and whereas any and all such rights are in the hands of the last directors as Trustees on behalf of the stockholders of Photometric Products Corporation.

"Whereas R. V. Judson is possessed of certain knowledge and believes that some benefit should be obtained for the benefit of the stockholders of the Photometric Products Corporation, Therefore it is agreed as follows:

"The Trustees and Directors of the Photometric Products Corporation hereby confer upon R. V. Judson irrevocable authority to act as their Trustee and Attorney-in-fact and representative with the sole irrevocable right to adjust, settle or enforce by suit or otherwise all their claims or rights of action as may now exist or hereafter arise against any persons, Partnerships, corporations or combinations thereof as may appear in the judgment of R. V. Judson to be collectible or enforceable.

"R. V. Judson as trustee for the directors of the Photometric Products Corporation agrees to pay, to said directors, as such Trustees for the Stockholders fifteen percent of any and all amounts which he may receive or recover upon any or all of the combined assets or rights recovered, whether under any rights recoverable under his legally enforceable present rights or under such rights as might only be recoverable by Stockholders rights of enforcement only.

"He as irrevocable Trustee for the Directors is to retain eighty-five percent of any and all collections made as compensation for his work and expenses incurred.

"In consideration of the foregoing the said parties hereto at once accept the duties hereunder the above agreement and

"Whereas E. V. Johnson is also a resident of

Photometric Products Corporation,

"Whereas E. V. Johnson believes that the following

assets and rights of action are not subject to the same
judgment creditor and which are in the hands of the
the hands of the last directors of Photometric Products Corporation
absentees of Photometric Products Corporation.

"Whereas E. V. Johnson is possessed of and in the hands

and believes that some benefit would be derived from the
fit of the shareholders of the Photometric Products Corporation
Therefore it is agreed as follows:

"The Trustees and Directors of the Photometric Products

Corporation hereby confer upon E. V. Johnson the authority
to act as a full trustee and attorney-in-fact and representative
with the sole irrevocable right to sell, lease, convey or dispose of
any or otherwise all the assets and rights of action of the
now exist or hereafter arise against and among, Photometric
corporations or organizations located or may exist in the United
States of E. V. Johnson to sell, lease, convey or otherwise

"E. V. Johnson is granted for the purpose of the above

Photometric Products Corporation hereby agrees to sell, lease, convey or
such trustee for the Photometric Products Corporation of any and
all assets which he may receive or recover from any or all of
the combined assets or rights recoverable, including the rights
recoverable under his legally enforceable present rights or under
such rights as might only be recoverable by Photometric Products
of enforcement only.

"He as irrevocable trustee for the Photometric Products Corporation

eighty-five percent of any and all collections made as compensation
him for his work and expenses incurred.

"In consideration of the foregoing the said parties here-

to at once accept the duties hereunder the above agreement and

bind themselves and each thereof and covenant that they and each thereof will devote the knowledge heretofore obtained and pursue the further research necessary to the purposes of this Contract and the enforcement of the purposes above set forth.

"Upon the signing of this agreement all records of the Photometric Products Corporation of every kind and nature are to be turned over to R. V. Judson, Trustee and Attorney-in-fact by whomsoever may possess the same.

"And said Judson agrees to at once proceed to the best of his ability and at his own expense to enforce as completely as possible the rights hereinabove contemplated against any and all persons and corporations who in good conscience are obligated to the Photometric Products Corporation.

"In witness whereof the said directors of said Corporation have hereunto set their hands and attached the seal of said corporation all under resolution held at a special meeting of said Board at the city of Chicago, this tenth (10) day of April, 1939.

"Photometric Products Corporation.

"Witness:

"Helene Bruce

"R. W. Nessler

"Vice President, acting as President
and Board of Directors

"Witness:

"Helene Bruce

"Guilford B. Davis

"Secretary and Director.

"Henry Kraebber

"Trustee for Stockholders of
Photometric Products Corp.
Treasurer & Director

"Witness:

"B. B. Judson

"R. V. Judson

"SEAL"

-4-

bind themselves and each thereof and covenant to say and
 each thereof will devote the knowledge, skill, care and ability
 and pursue the further research necessary to the success of
 this contract and the enforcement of the purposes above set
 forth.

"Upon the signing of this agreement the records of
 the Photomastic Products Corporation of every kind and nature
 are to be turned over to W. F. Johnson, President of the
 in fact by whomsoever may possess the same.

"And said Johnson agrees to hold harmless to the
 best of his ability and as his own affairs no matter as
 completely as possible the rights heretofore contemplated
 against any and all persons and claims thereof in good con-
 science are obligated to the Photomastic Products Corporation
 "In witness whereof the said corporation of said cor-
 poration have hereunto set their hand and seal at the city of
 of said corporation all their resolution had and passed at a
 meeting of said Board at the city of Chicago, this tenth
 (10) day of April, 1933.

"Photomastic Products Corporation,
 "Witness:
 "Helene Bruce
 "Vice President, Acting as President
 and Board of Directors
 "Witness:
 "Helene Bruce
 "Secretary and Treasurer,
 "Henry Treppner
 "Treasurer for stockholders of
 Photomastic Products Corp.
 Treasurer & Director
 "Witness:
 "W. F. Johnson
 "Sole"

At the time of the execution of this contract Photometric was a defunct corporation, the State of Delaware having forfeited its charter, and it was not until April 30, 1943, that plaintiffs secured a revival of the charter. The corporation never made any money and never paid a dividend. Judson held, at the time, a judgment against Photometric for \$10,000, but it had no tangible assets to meet the judgment. As the chancellor found, Photometric, at the time in question, had been virtually abandoned by its stockholders. The only asset of the company was an equitable claim to a patent known as the Radtke patent, Photometric claiming that Radtke and others had obtained title to the Radtke patent under circumstances that made them trustees for Photometric. Radtke Patents Corporation had the legal title to the patent. After the making of the contract Judson caused to be commenced in the United States District Court of New York a suit entitled: "Photometric

Products Corporation, Russell V. Judson, individually and as Trustee for the Directors and Stockholders of the Photometric Products Corporation; Lester T. Nelson, Guilford B. Davis, stockholders of said corporation in his own behalf and for such other stockholders as may desire to join in this suit, Plaintiffs vs. Albert A. Radke, Leonard Day, Thomas J. Martin, Radke Patents Corporation, a corporation, Warner Brothers Pictures, Incorporated; and Virgil C. Crites, Defendants." That suit was brought to enforce the claim of

Photometric to the equitable title to the Radtke patent. Briefly stated, the claim seems to be founded on the following alleged facts: That in 1916 there was a corporation known as the American Development & Operating Company and one Virgil C. Crites was its general manager; that on September 13, 1916, Crites made application (U. S. Serial No. 119,951) for letters

*Photometric is defunct
corporation is under
liquidation*

patent covering the photo-electric cell connected with a mechanical device; that Albert A. Radtke, while employed under special contract by that company, undertook further improvements in the field covered by the said application, and invented and devised various improvements and embodied same in an application for letters patent filed in the United States Patent Office, Serial No. 176,290; that thereafter Crites, together with C. B. O'Connor and others, incorporated Photometric Products Corporation, a Delaware corporation, to continue the development of the patent covered in application No. 176,290; that on December 18, 1920, Photometric received a bill of sale for the application for letters patent No. 176,290 and thereafter it employed Radtke to make further developments in the field covered by said application, and that all of his effort in that direction for a period of two years became the property of Photometric; that on May 6, 1921, Radtke filed an application in the United States Patent Office entitled, "Methods of and Means for Optically Recording and Reproducing Sound," which application bears Serial No. 609,196, and on April 19, 1938, a patent, No. 2,114,939, was issued to him, and that Photometric is the equitable owner of said patent.

That the Radtke patent is not as valuable or important as it was once supposed to be appears from the opinion in Radtke Patents Corporation v. Coe, 122 F. (2d) 937, where the court held (pp. 954, 955) that Radtke invented nothing; that numerous parties had been working toward the same objective; that what was involved was not invention and that at the end of their work the opportunity for invention had passed; that sound-reproducing apparatus embodying photo-electric cell was not patentable because lacking in invention. Judson has spent, in the New York suit, \$35,000 in cash; he has

patent covering the photo-electric cell connected with a mechanical device; that Albert A. Hadtke, while employed under special contract by that company, in 1920, further improvements in the field covered by the said application, and invented and devised various improvements and embodied same in an application for letters patent filed in the United States Patent Office, Serial No. 1,114,932, and after that, together with A. A. Hadtke and others, incorporated Photometric Products Corporation, a private corporation, to continue the development of the said improvements in application No. 1,176,292; that on September 1, 1922, Hadtke received a bill of sale for the said application for letters patent No. 1,176,292 and thereafter it employed Hadtke to make further developments in the field covered by said application, and that all of his efforts in that direction were worked out, two years became the property of Photometric; that on May 6, 1921, Hadtke filed an application in the United States Patent Office entitled, "Methods of and means for optically recording and reproducing sound," which application bears Serial No. 609,196, and on April 12, 1922, a patent, No. 1,114,932, was issued to him, and that Photometric is the equitable owner of said patent.

That the Hadtke patent is not as valuable or important as it was once supposed to be appears from the opinion in Hadtke Patents Corporation v. Goe, 122 F. (2d) 927, where the court held (pp. 924, 925) that Hadtke invented nothing; that numerous parties had been working toward the same objective; that what was involved was not invention and that at the end of their work the opportunity for invention had passed; that sound-reproducing apparatus embodying photo-electric cell was not patentable because lacking in invention. Jackson has spent, in the New York suit, \$35,000 in cash; he has

incurred bills of \$15,000 in connection with the suit, and has devoted about ninety-five per cent of his time since the contract was made to that suit. Two of the defendants in that suit, Warner Brothers Pictures, Inc., and its subsidiary, Radtke Patents Corporation, are strong corporations financially and otherwise. The said proceedings were still pending in the trial court at the time of the hearing in the instant case. That the claim of Photometric that is asserted in the New York case was considered a very questionable asset is evident from the fact that over a long period of years neither Photometric nor any of its stockholders had seen fit to start any proceeding to enforce the alleged equitable claim of Photometric to the Radtke patent. It is not disputed that Judson was making an earnest effort to enforce the Photometric claim in the New York suit. If Photometric, the plaintiff in that suit, cannot succeed in that suit, the present proceedings to cancel the agreement in question would be useless.

At the conclusion of the hearing the chancellor rendered the following opinion:

"The Court: The complaint in this case charges in paragraph 3 that the officers and directors of the Photometric Products Corporation and Judson 'conceived the idea of obtaining valuable properties hereinafter referred to from said corporation, and of converting the same to their own use without paying said corporation anything therefor.'

"The properties referred to are the alleged patents, and papers which will support the claim to the alleged patents. I find that the averment in the complaint has no support in the evidence. It is true that the officers and directors of the corporation did enter into a contract with Judson by which these assets were transferred to Judson, and it was agreed that Judson in the event he recovered in the suit on the patent would pay

incurred bills of \$1,000 in connection with the suit, and
has devoted about ninety-five per cent of its time since the
contract was made to that suit. Two of the defendants in
that suit, Warner Brothers Pictures, Inc., and the subsidiary,
Radio Pictures Corporation, are among the persons who actively
and otherwise. The said proceedings were still pending in the
trial court at the time of the hearing in the instant case.
That the claim of Photomobile that it is asserted in the New York
case was considered a very questionable claim is evident from
the fact that over a long period of years neither Photomobile
nor any of its stockholders had seen fit to set up any proceed-
ing to enforce the alleged equitable claim of Photomobile to
the instant patent. It is not alleged that there was a meeting
or earnest effort to enforce the Photomobile claim in the New
York suit. If Photomobile, the instant in suit, cannot
succeed in that suit, the same proceedings to cancel the
agreement in question would be useless.

At the conclusion of the hearing the trial court rendered
the following opinion:

"The Court: The complaint in this case charges in para-
graph 3 that the officers and directors of the Photomobile Pro-
ducts Corporation and Tudson 'conceived the idea of obtaining
valuable properties hereinafter referred to from said corpo-
ration, and of converting the same to their own use without pay-
ing said corporation anything therefor.'
"The properties referred to are the alleged patent,
and papers which will support the claim to the alleged patents.
I find that the averment in the complaint has no support in the
evidence. It is true that the officers and directors of the
corporation did enter into a contract with Tudson by which these
assets were transferred to Tudson, and it was agreed that Tudson
in the event he recovered in the suit on the patent would pay

the directors of the corporation therein named 15 per cent of his recovery, but those directors were in turn charged with a trusteeship on behalf of all the stockholders, and it was intended under that contract that they should make distribution among those stockholders on a pro rata basis. There is nothing in the evidence whatever to support the averment, and what is a direct inference that could be drawn from the averment, that these directors were getting something for themselves personally. They were not. I find, therefore, that there was no conspiracy between these directors and Judson to obtain the property and assets of the corporation for themselves.

"The second point which is made by plaintiffs in this case is that the contract was unlawful because it contemplated the liquidation of a corporation in an unlawful manner. The only people who could possibly be interested in that would be creditors of the corporation, and while there are some decisions in this state that hold that directors of a corporation are not only trustees of the stockholders but as well of the property for benefit of creditors of the corporation, still where the plaintiffs in this case sue as stockholders and base their rights on their holding of stock, and no creditor appears here to complain of the contract, it seems to the Court to be far-fetched to require me to go out of my way to hold the contract invalid on that account, particularly when it appears that this corporation had been virtually abandoned by its stockholders. The plaintiffs themselves testified that they had given up all hope, they had thrown up their hands. One of them said he had lost all interest in the corporation because of its management, etc., etc., but from their testimony it was quite apparent to the Court that they had ceased to have any interest in the corporation, that they considered it one of those speculative investments in a patent right to a great invention which had

the directors of the corporation therein named I, per cent of his recovery, but those directors were in turn engaged in a trusteeship on behalf of all the stockholders, and it was intended under that contract that they should make a distribution among those stockholders on a pro rata basis. There is nothing in the evidence whatever to support the contention, and it is a direct inference that could be drawn from the evidence, that these directors were getting something for the money personally. They were not, I find, therefore, that there was no conspiracy between these directors and others to obtain the property and assets of the corporation for themselves.

"The second point which is made by the plaintiffs in this case is that the contract was unlawful because it contemplated the liquidation of a corporation in a fraudulent manner. The only people who could possibly be interested in this would be creditors of the corporation, and while it is true that some of the directors of the corporation were interested in the property only trustees of the stockholders but as well of the property for benefit of creditors of the corporation, still where the plaintiffs in this case are as stockholders and have no rights on their holding of stock, and no creditor appears here to complain of the contract, it seems to the Court to be immaterial to require me to go out of my way to hold the contract invalid on that account, particularly when it appears that this corporation had been virtually abandoned by its stockholders. The plaintiffs themselves testified that they had given up all hope, they had thrown up their hands. One of them said he had lost all interest in the corporation because of its management, etc., etc., but from their testimony it was quite apparent to the Court that they had ceased to have any interest in the corporation, that they considered it one of those speculative investments in a patent right to a great invention which had

ultimately disappointed them.

"Now, after years in which the corporation lay dormant, Mr. Judson, a man of a very keen speculative type, appeared and revived the hope of the stockholders that something might be saved from their investments. He made what on its face appears to be a harsh contract. He was to get 85 per cent of the recovery and the stockholders were only to get 15 per cent. Of course, if this were a contract with a lawyer the Court would have some right under the law to say it was unreasonable because the percentage was too large, but it is not, it is a contract between laymen, and under it Judson was to prosecute the suit and was to lay out the money. According to his testimony he has already spent \$35,000 in cash, and he has already incurred obligations to the amount of about \$15,000, according to his testimony, and still there has been no recovery in this litigation.

"Now, the contract was made, I think, with all parties having their eyes open, the directors feeling that whatever they got out of this new arrangement with Judson was just that much saved for the corporation.

"I have no right and I don't think it is the business of the Court to interfere with contracts that are carefully made between businessmen. The result of this may be that Judson will lose his \$50,000, and whatever additional moneys he puts in - who knows. But whatever that may be, whatever may come of it, the stockholders and directors knew what they were doing. There is no evidence to show the contrary.

"That brings us to the third point in the complaint, which is the concealment of a material fact from the directors and the stockholders. One fact which it is alleged was concealed from the directors and from the stockholders is, it is

ultimately disappointed them.

"Now, after years in which the corporation lay dormant,

Mr. Jackson, a man of a very keen speculative eye, appeared and

revived the hope of the stockholders that the corporation might be

saved from their investments. He made a bid in the face of the

to be a hard contest. He was to get a good deal of the

recovery and the stockholders were to get a good deal of the

of course, in this case a contest with the corporation.

would have some right under the law to say it was unreasonable

because the percentage was too large, but it is not, it is a

contract between them, and under it Jackson was to recover

the suit and was to pay out the money. According to the contract

money he has already paid \$5,000 in cash, and he has already

incurred obligations to the amount of about \$12,000, according

to his testimony, and still there is a balance of about \$7,000

this litigation.

"Now, the contract was made, I think, with all parties

having their eyes open, and the stockholders taking what whatever

they got out of this new arrangement. Mr. Jackson was just what

much saved for the corporation.

"I have no right and I don't think it is the business

of the Court to interfere with contracts that are lawfully

made between businessmen. The result of this may be that

Jackson will lose his \$5,000, and whatever additional money

he puts in - who knows. But whatever that may be, whatever

may come of it, the stockholders and directors are what

they were doing. There is no evidence to show the contrary.

"That brings us to the third point in the complaint,

which is the concealment of a material fact from the directors

and the stockholders. One fact which it is alleged was con-

cealed from the directors and from the stockholders is, it is

said, this claim of the corporation to the Radtke patent. That is wholly unsupported by the evidence. Judson and the directors knew of their hope so far as the Radtke patent was concerned. What is the real worth, if these hopes be realized, no one can say, but I find that Judson did not conceal those facts from the directors, and that they were not concealed from the stockholders.

"I find also that at the stockholders' meeting in December of 1941 the plaintiff Wachta appeared at the meeting, that he had the proxies of his two associate plaintiffs, that he there expressed some dissatisfaction with the fact that Judson would get 85 per cent of any recovery, but in substance stated it was his conclusion that it was the best deal that could be made and under the circumstances he would vote for the resolution to affirm it.

"What more is there for the Court to do under those circumstances? I cannot act as a guardian of businessmen. No Court can. I cannot and should not set aside a contract merely because I dislike it or because I think the amount of the 'take' on behalf of one party, to use the vernacular, is too large. But look at what the position might be if the Court were to hold otherwise. So far as it appears today this corporation is in no position to finance this litigation, and if the contract were set aside there is no assurance that the whole thing would not be dropped and the corporation lose the prospect of everything, merely by this litigation. I find the complaint is not equitable and should be dismissed.

"I stated in my remarks all the points you have raised, Mr. Chancellor [counsel for plaintiffs].

"Mr. Chancellor, Jr.: Your Honor dismisses the bill for want of equity?

"The Court: Yes."

said, this claim of the corporation to be a corporation is wholly unsupported by the evidence. The corporation and the directors knew of their hope so far as the future payment of the money, that is the real worth, if there were to be a liquidation, no one can say, but I think that the corporation did not consider these facts from the directors, and that they were not considered

from the stockholders.

"I find also that the stockholders, as things in December of 1901 the plaintiff, certain persons at the meeting, that he had the promise of the two stockholders, that he there expressed some dissatisfaction with the corporation. The corporation would get 80 per cent of any recovery, and in substance stated it was his contention that it was a corporation and that could be made and under the circumstances in which it was for the resolution to affirm it.

"That more is there for the court to do than to say that the circumstances I cannot see as a violation of the corporation. He cannot say, I cannot and should not set aside a contract merely because I think it is on a wrong basis. I think the amount of the 'take' on behalf of one party, so far as the corporation is too large. But look at what the position might be if the court were to hold otherwise. A far as it appears today this corporation is in no position to finance this litigation, and if the contract were set aside there is no reason to think the whole thing would not be dropped and the corporation lose the prospect of everything, merely by this litigation. I think the complaint is not equitable and should be dismissed.

"I stated in my remarks all the points you have raised, Mr. Chancellor [counsel for plaintiff].

"Mr. Chancellor, Jr.: Your Honor dismisses the bill for want of equity? "The Court: Yes."

It appears from the foregoing opinion that the chancellor passed upon every point that was raised by counsel for plaintiffs in support of their contention that the plaintiffs were entitled to the relief they asked, and after a careful examination of the evidence we find ourselves in accord with the findings and conclusions of the chancellor. Upon appeal the plaintiffs have urged two new points that they did not present to the chancellor and that were not put in issue by the pleadings, viz: (1) that Judson and the directors were guilty of fraud in procuring and voting proxies at the adjourned meeting at which the contract was ratified, and (2) that the delegation of power by the directors to Judson to act for the corporation under the contract was void as against public policy. Plaintiffs cannot raise in this court new questions that they did not present to the chancellor at the hearing. The complaint sought to set aside the contract and to enjoin the New York suit on the grounds of fraud. Here the appellants advance the theory that the contract was an unlawful delegation of power by the directors and therefore void as against public policy, and that the directors and Judson fraudulently obtained and voted proxies at the adjourned meeting in favor of ratification of the contract. Plaintiffs presented the case to the chancellor on the theory that by means of a conspiracy existing between the directors and Judson they fraudulently entered into a contract whereby the assets of the corporation were converted by Judson to himself and the directors without paying anything therefor. Parties, upon an appeal, are restricted to the theory on which the cause was tried in the court below. We are strongly impressed with the statement of the chancellor that the corporation is in no position to finance the New York litigation and that if the contract were set aside there is no assurance

It appears from the foregoing opinion that the original
complaint was passed upon every point and that the original
plaintiffs in support of their contention that the
were entitled to the relief sought, and that the
examination of the evidence in this case, even in the light
of the findings and conclusions of the court, does not
the plaintiffs have any right to the relief sought
present to the court, and that the court is bound by
the findings, viz: (1) that the plaintiffs were
guilty of fraud in procuring the money from the
joint meeting at which the money was raised, and (2)
that the delegation of power by the directors to the
not for the corporation in the contract in issue as against
public policy. The court in this case has
questions that they did not raise at the trial, and the
meaning. The complaint sought to set aside the contract of the
to enforce the New York act on the ground of fraud, and
the appellants, besides the theory of the contract, as an
unlawful delegation of power by the directors and therefore
void as against public policy, and the directors and
Johnson fraudulently obtained the money from the joint
joint meeting in favor of the directors of the corporation.
Plaintiffs presented the case to the court on the theory
that by means of a conspiracy existing between the directors
and Johnson they fraudulently entered into a contract whereby
the assets of the corporation were converted to the use of the
self and the directors without paying anything therefor.
Parties, upon an appeal, are restricted to the issues on which
the case was tried in the court below. As the court below
pressed with the statement of the Chancellor that the cor-
poration is in no position to finance the New York litigation
and that if the contract were set aside there is no assurance

"that the whole thing would not be dropped and the corporation lose the prospect of everything, merely by this litigation." There is force in the contention of the defendants that plaintiffs did not offer to do equity in their complaint nor at the hearing; that the undisputed evidence is that Judson has spent large amounts of money and devoted practically all of his time to enforce the subject matter of the contract and that as plaintiffs asked for a cancellation of the contract, as a matter of equity, they should have, in their complaint, offered to reimburse Judson for the sums of money he has expended and should have supported the offer at the hearing by proof that they were willing and able to reimburse him, but that they made no offer or showing before the chancellor in that regard. The claim advanced in the New York suit is of such a highly speculative character that the plaintiffs undoubtedly feel that they would not be warranted in reimbursing Judson for the moneys he has expended. We are further impressed with the fact that Wachta had abandoned the case, that the appellants represent but 1/560 of the outstanding stock of Photometric, and that none of the other 450 stockholders have seen fit to join in the complaint. It must be presumed that the stockholders other than plaintiffs were satisfied with the terms of the contract. Allegations of conspiracy, collusion and fraud must be clearly proven, and, certainly, the appellants, with their small holdings, should have made out a clear case to warrant a decree in their favor. They have not done so.

The decree of the Superior court of Cook county entered in this cause should be and it is affirmed.

DECREE AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

"that the whole thing would not be accepted by the corporation
least the prospect of everything, merely by this litigation."
There is force in the contention of the defendants that plain-
tiffs did not offer to do equity in their own case, but that
hearing; that the undisputed evidence is that Jackson had spent
large amounts of money and devoted practically all of his time
to enforce the subject matter of the contract and that he had
little asked for a consideration of the contract, as a matter of
equity, they should have, in their complaint, offered to re-
burs Jackson for the sums of money he has expended in such
have supported the offer as the hearing of proof that they were
willing and able to reimburse him, but they have no offer
or showing before the chancellor in that regard. The claim ad-
vanced in the New York suit is of such a highly speculative char-
acter that the plaintiffs undoubtedly feel that they would not be
warranted in reimbursing Jackson for the money he has expended.
We are further impressed with the fact that bonds had abandoned
the case, that the appellants represented but 1/3 of the out-
standing stock of Litchfield, and that none of the other 2/3
stockholders have seen fit to join in the complaint. It must be
presumed that the stockholders other than Litchfield were satis-
fied with the terms of the contract. Allegations of conspiracy,
collusion and fraud must be clearly proved, and, certainly, the
appellants, with their small holdings, should have made out a
clear case to warrant a decree in their favor. They have not
done so.

The decree of the Superior Court of Cook County entered
in this cause should be and it is affirmed.
JAMES W. WELLS,
Sullivan, J., and Friend, J., concur.

43115

PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

v.

JOHN H. COLEMAN,

Plaintiff in Error.

322 Ill. 231

ERROR TO MUNICIPAL

COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On August 13, 1943, Judge Edelman entered an order in the Municipal court of Chicago finding William Katelhut and John H. Coleman guilty of direct contempt of court. Katelhut was sentenced to sixty days in the county jail and Coleman was sentenced to six months in the county jail. Katelhut sued out a writ of error to reverse the judgment as to him and on April 6, 1944, we filed an opinion affirming the judgment as to him. (See People v. Katelhut, 322 Ill. App. 693.) The instant writ of error is sued out by Coleman to reverse the judgment as to him.

The trial court, at the outset of the proceedings, entered a rule on defendants to show cause why they should not be punished for contempt of court, and defendant Coleman filed an answer to the rule but the record shows that the trial court concluded to disregard the preliminary proceedings and proceeded upon the theory that both defendants were guilty of direct contempt for acts committed in the presence of the court, and the order from which plaintiff in error appeals is clearly a direct contempt order. The trial court had a right to proceed as he did. (See People v. Gard, 259 Ill. 238, 242.) The "bill of exceptions" contains a statement by the trial court that while he had caused an investigation to be made of the circumstances surrounding the alleged contempt he was finding the defendants guilty of contempt on their acts committed in the presence of the court. Counsel for the People state in their brief: "The

PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

v.

JOHN H. COLEMAN,
Plaintiff in Error.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

On August 13, 1943, Judge Hoffman entered an order in the Municipal Court of Chicago finding William Hoffman and John H. Coleman guilty of direct contempt of court. Hoffman was sentenced to sixty days in the county jail and Coleman was sentenced to six months in the county jail. Hoffman filed out a writ of error to reverse the judgment as to him and on April 6, 1944, we filed an opinion affirming the judgment as to him. (See People v. Hoffman, 323 Ill. 2d, 273.) The instant writ of error is filed out by Coleman to reverse the judgment as to him.

The trial court, at the outset of the proceedings, entered a rule on defendants to show cause why they should not be punished for contempt of court, and defendant Coleman filed an answer to the rule but the record shows that the trial court concluded to disregard the preliminary proceedings and proceeded upon the theory that both defendants were guilty of direct contempt for acts committed in the presence of the court, and the order from which plaintiff in error appeals is clearly a direct contempt order. The trial court had a right to proceed as he did. (See People v. Gaud, 329 Ill. 2d, 242.) The "bill of exceptions" contains a statement by the trial court that while he had caused an investigation to be made of the circumstances surrounding the alleged contempt he was finding the defendants guilty of contempt on their acts committed in the presence of the court. Counsel for the People state in their brief: "The

order is clearly based upon what happened in open court and what the Court knew from the happenings in open Court."

"When an act constituting a direct contempt is committed in the presence of the judge, under circumstances which give him personal knowledge of the facts, he may punish the offender summarily without entering any rule against him and without hearing any evidence. (People v. Andelman, 346 Ill. 149; People v. McDonald, 314 id. 548; People v. Gard, 259 id. 238.) The order adjudging a contemner guilty must set out the facts constituting the contempt with sufficient definiteness and certainty to show that the court was authorized to make the order. People v. Rockola, 346 Ill. 27; People v. Hogan, 256 id. 496." (People v. Sherwin, 354 Ill. 371, 374, 375. Italics ours.)

Because of the summary nature of a direct contempt proceeding and because the facts stated in the judgment order must be taken as true by the reviewing court, the necessity for a strict enforcement of that part of the foregoing rule which we have italicized is obvious.

The judgment order, omitting the caption, reads as follows:

"It appearing to the Court that on the 26th day of July, 1943, while the Court was in session, the following took place in the presence and hearing of the Court.

"The Court, the Honorable Leon Edelman, having been duly elected and sitting as Judge of the Municipal Court of Chicago, called from his calendar the cause of the City of Chicago vs. Edgar Morgan, Municipal Court case Number 122936, which cause was then pending in the Municipal Court, in which said cause the defendant had been duly charged in said Municipal Court with the offense of Disorderly Conduct.

"In response to the call of said cause, a colored man

order is clearly based upon what happened in open court and

what the Court knew from the happenings in open court."

"When an act constituting a direct contempt is

committed in the presence of the judge, under circumstances

which give him personal knowledge of the facts, he may punish

the offender summarily without entering any bill against him

and without hearing any evidence. (People v. Williams, 140

Ill. 149; People v. Thompson, 114 Ill. 44; People v. ...

259 Ill. 238.) The order adjudging a contempt was not proper

set out the facts constituting the contempt with sufficient

definiteness and certainty to show that the Court was authorized

to make the order. People v. McKelvey, 146 Ill. 37; People v.

Hogan, 250 Ill. 436. (People v. Thompson, 256 Ill. 171, 37,

375, Illinois cases.)

Because of the summary nature of direct contempt pro-

ceeding and because the facts stated in the judgment order must

be taken as true by the reviewing court, the record is for a

strict enforcement of that part of the foregoing rule which we

have italicized is obvious.

The judgment order, entitled the caption, reads as

follows:

"It appearing to the Court that on the 14th day of

July, 1943, while the Court was in session, the following took

place in the presence and hearing of the Court.

"The Court, the Honorable Leon Edelman, having been

duely elected and sitting as Judge of the Municipal Court of

Chicago, called from his calendar the cause of the City of

Chicago vs. Edgar Morgan, Municipal Court case number 122936,

which cause was then pending in the Municipal Court, in which

said cause the defendant had been duly charged in said Municipal

Court with the offense of Disorderly Conduct.

about the age of 25 years, with dark, kinky hair, about 5 feet 5-1/2 inches in height, answered as the defendant; thereupon the Court, the Honorable Leon Edelman, examined the files in said cause and discovered and ascertained that the defendant mentioned in said cause was a white man, gray haired, of the age of 70 years, of a height of 5 feet 9-1/2 inches, and his occupation was set forth as banker and he resided at the Hyde Park Hotel.

"The Court then asked the defendant before the bar whether he had told the police officer that he lived at the Hyde Park Hotel, that he was 70 years of age and that he was a banker by occupation, and the colored man answered that he was so drunk he did not know. Then the Court, addressing Officer Katelhut, asked who had made out the arrest slip at the Hyde Park Station and Katelhut said that he had made it out and that he had written out the answers given him by the arrested man. The Court then asked if the negro at the bar was the defendant Edgar Morgan, whom he had arrested on July 25, 1943 and he replied that he was. The Court then asked the colored man if he was Edgar Morgan and he said he was. The Court then asked the colored man if he made the answers on the arrest slip and if he was a banker. He replied that he was drunk and did not remember, but that he was a porter. The Court then asked John H. Coleman, who was present in Court, to step to the bar and asked said Coleman if this was the man whose bail he signed and Coleman said Yes. The Court thereupon ordered the policeman to take the colored man into custody.

"The said policeman, William Katelhut, before court adjourned and after the Court had ordered an inquiry in respect to this case, rushed into Court and stated to the Court that the colored man had escaped and the Court further finds that the actual name of the colored man was never ascertained and has

about the age of 25 years, with dark, kinky hair, about 5 feet 5-1/2 inches in height, answered as the defendant; thereupon the Court, the Honorable Leon Johnson, examined the files in said cause and discovered and ascertained that the defendant mentioned in said cause was a white man, gray haired, of the age of 70 years, of a height of 5 feet 1-1/2 inches, and his occupation was set forth as banker and he resided at the Hyde Park Hotel.

"The Court then asked the defendant before the bar whether he had told the police officers that he lived at the Hyde Park Hotel, that he was 70 years of age or that he was a banker by occupation, and the colored man answered that he was so drunk he did not know. Then the Court, addressing Officer Katschinski, asked who had made out the arrest slip at the Hyde Park Station and Katschinski said that he had made it out and that he had written out the answers given him by the arrested man. The Court then asked if the name of the bar was the defendant Edgar Morgan, whom he had arrested on July 25, 1944, and he replied that he was. The Court then asked the colored man if he was Edgar Morgan and he said he was. The Court then asked the colored man if he made the answers on the arrest slip and if he was a banker. He replied that he was drunk and did not remember, but that he was a porter. The Court then asked John H. Coleman, who was present in Court, to step to the bar and asked said Coleman if this was the man whose name he signed and Coleman said Yes. The Court thereupon ordered the policeman to take the colored man into custody.

"The said policeman, William Katschinski, before Court adjourned and after the Court had ordered an inquiry in respect to this case, rushed into Court and stated to the Court that the colored man had escaped and the Court further finds that the actual name of the colored man was never ascertained and has

not been ascertained up to the entry of this Order.

"Thereupon the Court inquired of the police officer who made the arrest of the defendant and who was then present in open court, if the colored man who answered at the bar was the defendant Edgar Morgan, and the said officer answered Yes; and thereupon the Court inquired of one John H. Coleman, who had signed the bond for said Edgar Morgan, defendant, whether the colored man was the defendant in the case then called for hearing by the Court and the said John H. Coleman who had signed the bail bond, and as was disclosed by the files in said cause, answered that the colored man was the defendant and that he had signed the bond for him as Edgar Morgan; and thereafter Katelhut stated to the Court in open Court that he had not told the truth and that the colored man who had appeared as the defendant was not Edgar Morgan, and that he was trying to shield other parties and stated that the other party he was trying to shield was John H. Coleman, the professional bondsman; and the Court finds that the colored man was not Edgar Morgan and that Edgar Morgan was the true defendant arrested by Katelhut and was the person for whom John H. Coleman furnished bail.

"THE COURT FINDS that the said John H. Coleman and the said William Katelhut are now present in court and the Court finds that it has jurisdiction of the parties hereto and of the subject matter thereof, and because of the actions of the said Katelhut and Coleman, finds each of them guilty of Contempt of this Court and sentences the said William Katelhut to sixty (60) days in the County Jail for such Contempt and sentences the said John H. Coleman to six (6) months in the County Jail for such contempt."

In our view of this appeal we need only consider one of the many points raised by plaintiff in error. He strenuously contends that the judgment order shows that he did nothing before the court save to state that the young colored man then before the

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It must not be assumed that the above is a complete list of the possible cases.

of the fact that the only person who has been seen since the

1. "Діти, які не мають батьків, мають бути виховані в сім'ї."

to get a license. I've been in L.A. and I don't know the R.

the many benefits of this new technology.

It is noted that the fragment shows a lot of the following before the

court gave to state that the young colored man is a Negro and

court was the man that he bailed out; that there is not a single fact alleged in the order that tends to show that plaintiff in error did not, in fact, sign bail for the young colored man. The charge against Edgar Morgan was disorderly conduct and it is not disputed that bail for his appearance was given in the police station. The judgment order does not even purport to set up what occurred in the station at the time of the giving of the bond. In answer to the instant contention counsel for the People state: "Coleman was asked if the guilty man was the man he bailed out, and he told a falsehood to the Court by stating that he was, and the Court knew from all the circumstances appearing before him in the Court that Coleman was telling a falsehood. * * * The Court could clearly see that Coleman was testifying falsely, and that in addition to this he was in the conspiracy to substitute an outsider for the defendant, thus grossly interfering with the administration of justice;" that "the circumstances show that there was a conspiracy to foist a phony defendant on the Court, and the Court should be allowed to use its intelligence where an ordinary man would have done the same thing." This line of argument is a poor answer to plaintiff in error's contention. The court had the right to find Katelhut guilty of direct contempt, because, as found in the order, the latter admitted in open court that he had lied to the court. (See People v. Gard, supra.) But the judgment order as to plaintiff in error finds no facts that would tend to show that plaintiff in error lied when he made the statement in question to the court. In that state of the record, the court could not have found him guilty of direct contempt merely because he believed the statement was false. Even if it could be assumed that the police station, where plaintiff in error signed the bond, was a constituent part of the court, nevertheless, as the act of signing the bond and the circumstances surrounding the signing were not done in the immediate

[illegible]

presence of the court, extrinsic evidence was necessary to prove what occurred at the time and place in question, and that evidence must substantiate the charge. (See In re Estate of Kelly, 356 Ill. 174, 180.) But the judgment order does not even purport to set up what occurred in the station at the time of the giving of the bond, nor the circumstances, if any, that preceded the giving of the bond, nor does it show that the trial court heard any extrinsic evidence. Moreover, the trial court stated that his order was based upon what the court knew from the happenings in the court room. Where the extrinsic evidence heard by the trial court clearly establishes the guilt of a defendant, the court may reject the statement of the defendant and find him guilty of direct contempt, but the judgment order must show the extrinsic evidence heard and upon which the trial court based its findings. It appears in the "bill of exceptions" that the trial court, at the outset of the proceedings, appointed a friend of the court to investigate the facts surrounding the alleged contempt, and later the trial court heard in open court a report made by the friend of the court as to the result of his investigation, and it may be, as plaintiff in error insists, that the trial court was unconsciously influenced by this report when he found plaintiff in error guilty of direct contempt.

After a careful consideration of the judgment order and the law that applies to it, we have reached the conclusion that the order, so far as it relates to plaintiff in error, must be reversed. That there was a wilful and direct contempt of the court of an aggravated character committed by Katelhut, and others, appears from the judgment order. We are informed by counsel that Katelhut and Coleman have been indicted in the Criminal court of this county for conspiracy, and the People, in that proceeding, will have full opportunity to prove all of the relevant facts that bear upon the conspiracy.

presence of the court, extrinsic evidence was necessary to prove what occurred at the time and place in question, and that evidence must substantiate the charge, (see Ill. App. to 1911, 356 Ill. 144, 180.) But the judgment order does not even purport to set up what occurred in the station at the time of the killing of the boy, nor the circumstances, if any, which preceded the giving of the boy, nor does it show that the trial court heard any extrinsic evidence, however, the trial court in its order was based upon what the court knew from its own knowledge in the court room, and the extrinsic evidence heard by the trial court clearly established the guilt of the defendant, the court may reject the statement of the defendant, and the guilt of direct contact, for the judgment order does not show the extrinsic evidence heard upon which the trial court based its findings. It appears in the "Bill of Exceptions" that the trial court, at the request of the prosecution, appointed a referee of the court to investigate the facts surrounding the alleged contempt, and that the trial court based its judgment upon a report made by the referee of the court as to the result of his investigation, and it may be a plaintiff in error that, that the trial court was intentionally influenced by this report when it found plaintiff in error guilty of direct contempt.

After a careful consideration of the judgment order and the law that applies to it, we have reached the conclusion that the order, so far as it relates to plaintiff in error, must be reversed. That there was a willful and direct contempt of the court of an aggravated character committed by defendant, and others, appears from the judgment order. We are informed by counsel that defendant and Coleman have been indicted in the Criminal Court of this county for conspiracy, and the People, in that proceeding, will have full opportunity to prove all of the relevant facts

-7-

The judgment order of the Municipal court of Chicago, so far as it relates to John H. Coleman, plaintiff in error, is reversed.

JUDGMENT ORDER, SO FAR AS IT
RELATES TO JOHN H. COLEMAN,
PLAINTIFF IN ERROR, REVERSED.

Sullivan, P. J., and Friend, J., concur.

The judgment order of the Municipal Court of Chicago,

so far as it relates to John A. Colman, is hereby reversed.

is reversed.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the Court at Chicago, Illinois, this 10th day of June, 1908.

Calvin R. F. and William J. Connor, Clerks

43126

BERT HEAFNER,
Appellee,

v.

GEORGE HILL,
Appellant.

324 Ill. App.

APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

324 Ill. App. 232

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action in trover for the alleged conversion of a tractor auto truck. There was a trial by the court without a jury and a finding and judgment for plaintiff. His damages were fixed at \$1,050. Defendant appeals.

In February, 1943, defendant owned and operated two places of business, one at the corner of Western avenue and Irving Park boulevard, Chicago, and another at the southwest corner of Claremont avenue and Irving Park boulevard. They were about 125 to 150 feet apart. The first is a filling station. In the second defendant handles used cars, does greasing and washing, and sometimes rents space for cars over night. Plaintiff owned a 1941 Chevrolet tractor truck, which he had purchased some days prior to the transaction in question for \$1,050. For ten years prior to the transaction in question plaintiff had bought from defendant practically all of the gasoline he used. On February 17, 1943, plaintiff drove his truck to the Western avenue station of defendant and, according to his testimony, he told defendant that he wanted to store the truck with defendant and to have it serviced and all of the gas tanks filled, as he intended to mount his car on the back of the truck, drive it to West Texas, and put the truck on a highway job there or sell it; that defendant said, "All right," and they went over to the service station and defendant unlocked his service station and "we put the truck in there." Plaintiff testified that he saw the truck the next day in the forenoon and again in the evening about closing time, around 7 o'clock,

43126

BERT HEATNER, Appellee,

v.

GEORGE HILL, Appellant.

APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

3241.A.232

MR. JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

An action in trover for the alleged conversion of a tractor auto truck. There was a trial by the court without a jury and a finding and judgment for plaintiff. His damages were fixed at \$1,050. Defendant appeals.

In February, 1943, defendant owned and operated two places of business, one at the corner of Western Avenue and Irving Park Boulevard, Chicago, and another at the southwest corner of Clarence Avenue and Irving Park Boulevard. They were about 125 to 150 feet apart. The first is a filling station. In the second defendant handles used cars, does greasing and washing, and sometimes rents space for cars over night. Plaintiff owned a 1941 Chevrolet tractor truck, which he had purchased some days prior to the transaction in question for \$1,050. For ten years prior to the transaction in question plaintiff had bought from defendant practically all of the gasoline he used. On February 17, 1943, plaintiff drove his truck to the Western Avenue station of defendant and, according to his testimony, he told defendant that he wanted to store the truck with defendant and to have it serviced and all of the gas tanks filled, as he intended to mount his car on the back of the truck, drive it to West Texas, and put the truck on a highway job there or sell it; that defendant said, "All right," and they went over to the service station and defendant unlocked the service station and "we put the truck in there." Plaintiff testified that he saw the truck the next day in the forenoon and again in the evening about closing time, around 7 o'clock,

and the truck was locked up in the station; that on that day he asked defendant if he should pay him for the wash job now or later on when he paid the whole bill, to which defendant replied, "That's all right, you had to wash it yourself and you helped Dad," to which plaintiff answered, "No, I will pay you anyway, and I am going to pay you storage too," and he said, "No, that's all right; forget that," and plaintiff said, "No, I'll pay you the whole bill at once;" that about 9:30 o'clock that night defendant called him and told him "he had occasion to go to the station where the truck was stored and the door was wide open and the truck was gone;" that defendant suggested that plaintiff go to the police station and report the case; that he did so and Officer Bender and plaintiff went back to the filling station, arriving there about 10:30; that defendant was there; that plaintiff observed that the door was wide open and there were tracks in the damp pavement where the truck had been backed out. It was stipulated that the truck was stolen February 18, 1943, that later it was found in Tennessee in a dismantled condition by the F.B.I. officers, and that the truck had not been returned to plaintiff. The theory of fact of defendant was that plaintiff said nothing to him about any services on the car; that plaintiff asked defendant if he could leave the truck there over night as he was going to take a car down to Texas and he wanted to do some work on it; wanted to have a space to work on the car; that plaintiff asked defendant what he would charge him to leave the car there and that defendant answered that there would be no charge; that it would be all right to leave it there over night; that plaintiff told him that he wanted to fill the gasoline tanks before he left for Texas; that defendant did not drive the truck into the garage and did not know who did drive it in; that the garage had a sliding door, with wire glass windows in the back, and all the doors had Yale locks; that the next day plaintiff

and the truck was looked up in the station; at that time day
he asked defendant if he should pay for the work done now
or later on when he paid the whole bill, to which defendant
replied, "That's all right, you had to wait a moment and
you helped me," to which defendant answered, "I will pay
you anyway, and I am going to pay you a large fee," and he said,
"No, that's all right; forget that," and defendant said, "No,
I'll pay you the whole bill at once," that is, the whole
that night defendant called him and told him in his occasion
to go to the station where the truck was stored, and the door was
wide open and the truck was there; that defendant suggested that
plaintiff go to the police station to report the case; that he
did so and Officer Fender and plaintiff went to the station
station, arriving there about 11:00; that defendant was there;
that plaintiff observed that the door was open and the truck
was there in the back yard; that plaintiff saw the truck and
out. It was suggested that the truck was stolen January 18,
1945, that later it was found in a garage in a city called
tion by the T.E.I. officers, and that the truck had not been
returned to plaintiff. The theory of rest of the night was that
plaintiff said nothing to him about the service on the car; that
plaintiff asked defendant if he could leave the truck there over
night as he was going to take a car down to Texas and he wanted
to do some work on it; wanted to have a place to work on the car;
that plaintiff asked defendant what he would charge him to leave
the car there and that defendant answered that there would be no
charge; that it would be all right to leave it there over night;
that plaintiff told him that he wanted to fill the gasoline tanks
before he left for Texas; that defendant did not drive the truck
into the garage and did not know who did drive it in; that the
garage had a sliding door, with wire glass windows in the back,
and all the doors had Yale locks; that the next day plaintiff

said to defendant that he wanted to leave the car there another night as he had some work to do; that he had been downtown most of the day getting gasoline in the O.P.A. office to drive his car to Texas, and had not finished the work; that defendant told him it was all right to leave it another night; that plaintiff stated that he wanted to pay defendant what he owed him, to which defendant answered, "You don't owe me anything for leaving it there;" that defendant never had the keys to plaintiff's car; that after the truck was driven in on the second night by plaintiff defendant inspected the doors before he went to supper; that he closed the station about 7 o'clock; that about 9 or 9:30 that evening he happened to go over to the station, saw the door open, and then called plaintiff.

The first contention raised by defendant is that "there is a fatal variance between the plaintiff's complaint and proof." No argument or statement is made in defendant's brief in support of this contention, but we assume from a statement made in the so-called "Statement of the Case" that the contention is that the complaint alleges that plaintiff delivered the truck into the possession of defendant for the purpose of having it serviced for hire and that plaintiff's proof is that he wanted the car stored, and that this constitutes a fatal variance. A sufficient answer to this contention is that upon the trial no objection of any kind was made by defendant to the proof on the ground of variance, and it is too late to raise such question for the first time on appeal. (See Arado v. Epstein, 323 Ill. App. 194, 200, 201, and the cases cited therein.) A fortiori, upon the trial, at the conclusion of plaintiff's evidence, defendant made a motion for a finding for defendant but in that motion the instant contention was not raised nor suggested. That was the sole motion made during the entire trial for a finding in favor of defendant. The instant contention is clearly an afterthought, but, in any

-3-

said to defendant that he wanted to leave his car there another night as he had some work to do; that he had a car in his own name of the day getting gasoline in the U.S. of Texas; that defendant told him it was all right to leave it there another night; that defendant stated that he wanted to buy defendant's car and he told him, to which defendant answered, "You don't owe me anything for leaving it there;" that defendant never had the keys to the car; that after the truck was driven in on the second night by defendant, defendant inspected the car and he went to the car; that he closed the station about 10:30 p.m. of that evening; that he happened to go out to the station and the door open and then called defendant.

The first contention raised by defendant is that "there is a fatal variance between the testimony regarding the proof." No argument or statement is made in defendant's brief in support of this contention, but we assume from a statement made in the so-called "Statement of the Case" and the contention is that the complaint alleges that defendant delivered the truck into the possession of defendant for the purpose of having it serviced for nine and that plaintiff's proof is that he wanted the car stored, and that this constitutes a fatal variance. A sufficient answer to this contention is that upon the trial no objection of

any kind was made by defendant to the proof on the ground of variance, and it is too late to raise such question for the first time on appeal. (See Arado v. Epstein, 303 Ill. App. 194, 200, 201, and the cases cited therein.) A fortiori, upon the trial, at the conclusion of plaintiff's evidence, defendant made a motion for a finding for defendant but in that motion the instant contention was not raised nor suggested. That was the sole motion made during the entire trial for a finding in favor of defendant.

event, there is no merit in it, as plaintiff's evidence supports the allegations of the complaint.

In defendant's "argument" there is a contention made that plaintiff has failed to prove any kind of bailment by a preponderance of the evidence, but no argument or statement of any kind is made under this heading. However, it is sufficient to say in answer to this contention that the trial court saw and heard the witnesses and that a reviewing court will not disturb the findings of fact of the trial court based upon conflicting evidence unless they are clearly and manifestly against the weight of the evidence, and we are satisfied, after a careful consideration of the evidence, that we would not be justified in setting aside the findings of the court.

Defendant next contends that "if any kind of bailment is proven, it is a mere gratuitous one." This contention also involves conflicting evidence and we are satisfied with the finding of the trial court that the bailment in the instant case was not for the sole benefit of the bailor but for the mutual benefit of both parties. Defendant concedes that even if the bailment was for the sole benefit of the bailor defendant would be liable for gross negligence.

Plaintiff filed a cross-appeal, in which he asks that the judgment entered March 15, 1944, for \$1,050, in his favor, be reversed and the cause remanded with instructions to the trial court to enter judgment in his favor and against defendant for \$1,500, or, in the alternative, that this court enter judgment in favor of plaintiff and against defendant for \$1,500. Plaintiff contends that while he bought the truck a few days prior to the bailment for \$1,050, nevertheless, he testified, the fair market value of the truck at the time was \$1,500 and that his witness, Louis Manahan, testified to the same effect, and that

event, there is no merit in it, as defendant's evidence supports the allegations of the complaint.

In defendant's "affirmative" there is no contention made that plaintiff has failed to prove any kind of damage by a preponderance of the evidence, but no argument or statement of any kind is made under this heading. However, it is sufficient to say in answer to this contention that the fact I could not hear the witnesses and that a reviewing court will not disturb the findings of fact of the trial court based upon conflicting evidence unless they are clearly and manifestly erroneous. The weight of the evidence, and the fact that the evidence is in conflict, is a matter for the jury to decide, and the court in setting aside the verdict of the jury.

Defendant's contention that the fact I could not hear the witnesses and that a reviewing court will not disturb the findings of fact of the trial court based upon conflicting evidence unless they are clearly and manifestly erroneous. The weight of the evidence, and the fact that the evidence is in conflict, is a matter for the jury to decide, and the court in setting aside the verdict of the jury.

Plaintiff filed a cross-appeal, in which he asks that the judgment entered March 1, 1944, for \$1,000, in his favor, be reversed and the cause remanded with instructions to the trial court to enter judgment in his favor and against defendant for \$1,500, or, in the alternative, that this court enter judgment in favor of plaintiff and against defendant for \$1,500. Plaintiff contends that while he bought the truck a few days prior to the payment for \$1,050, nevertheless, he testified, the fact market value of the truck at the time was \$1,500 and that this witness, Louis Mahanah, testified to the same effect, and that

-5-

the trial court erred in not entering judgment in his favor for \$1,500. We think, in view of all the circumstances in this case, that the trial court acted equitably in fixing the damages at \$1,050, and that plaintiff should be well satisfied with that amount. The prayer of the cross-appeal will be denied.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

the trial court erred in not entering judgment in his favor
for \$1,500. We think, in view of all the circumstances in
this case, that the trial court acted equitably in fixing the
damages at \$1,000, and that plaintiff should be well satisfied
with that amount. The matter of the cross-appeal will be denied.
The judgment of the Superior Court of Cook County is

affirmed.

JOSEPH J. SULLIVAN,

Sullivan, J. J., and J. J., J., concur.

43035

L. E. ALMON, et al.,
Appellants,

v.

AMERICAN CARLOADING CO. PORA-
TION, et al.,
Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from a decree dismissing their complaint against the American Carloading Corporation (hereafter called the company) and officials of Highway Drivers, Helpers and Platform Workers Union, Division of Local 710, affiliated with the International Brotherhood of Teamsters, A. F. of L., seeking specific performance of an alleged contract between the union and the company and for an accounting and other relief in respect to the internal affairs of the Local. The defendants have filed a cross-appeal questioning the taxing of a portion of the master's fees against them and the action of the trial court in overruling their motion to strike the complaint for want of equity.

Plaintiffs are over-the-road drivers employed by the company as chauffeurs operating trucks between various cities. Fifty-seven of the original plaintiffs were members of Local 710 and the remaining 33 plaintiffs belonged to other similar locals. Approximately one-third of these plaintiffs later authorized the withdrawal of their names as parties to the suit. No relief is sought from the union, a voluntary association. The individual defendants are not sued in a representative capacity.

The complaint has a double aspect. Firstly, plaintiffs allege that they are members of their respective unions, employed by the defendant company as drivers and handlers of freight; that

J. E. ALMON, et al.,
Appellants,

v.

AMERICAN CANNING CO.,
Tos., et al.,
Appellees.

This case arises from a dispute between the appellants and the appellees concerning the ownership of certain rights in the use of the word "CANNED" in connection with the manufacture and sale of certain food products. The appellants claim that they are the rightful owners of these rights, while the appellees claim that they are the rightful owners. The dispute has been brought before the court for its decision.

The appellants claim that they have a right in the use of the word "CANNED" in connection with the manufacture and sale of certain food products. They claim that this right is based on the fact that they were the first to use the word in this connection, and that they have since established a reputation for their products. They claim that the appellees have infringed on their right by using the word in a similar manner.

2.

a dispute having arisen between the company and plaintiffs and other employees engaged in similar work over claims for back pay, the controversy was settled on December 23, 1940 by an agreement entered into between the company and representatives of Local 710 for the benefit of and on behalf of the employees whereby it was agreed that the strike of the employees theretofore called by the local union be called off; that the men return to work and the question of back pay be submitted without right of appeal to a committee consisting of two union men, two employers and an impartial chairman appointed by J. R. Steelman, Department of labor; that checks for the amounts due the members of Local 710 "be made payable to the worker and delivered to the Chicago (No. 710) Union, who will deliver the checks to the workers without deduction and get their receipts and deliver the receipts to the company;" that as a result of the agreement checks payable to the order of the plaintiffs were delivered to Local 710 and that the officials of the union refused to deliver them unless each plaintiff shall permit a deduction of 25 per cent of the amount of his check; that plaintiffs have refused to comply with this request and demanded the checks. Secondly, plaintiffs allege mismanagement of the union, refusal to give information or render an accounting as to the affairs of the union, etc., and, as to this aspect of the complaint, by amendment, that the action is brought "not only in their own behalf but on behalf of all other members of said Chicago Local Union No. 710." The prayer is for specific performance of the agreement and an accounting in regard to the checks and as to all financial transactions of Local 710 for the preceding 36 months, and the appointment of a receiver to take charge of the books, records and personal property of the union.

By their answer the individual defendants deny that the agreement of December 23, 1940 was entered into, and allege that the agreement between the union and the company for the adjustment of the

a dispute having arisen between the company and the union and other employees engaged in similar work over claims for back pay, the controversy was settled on December 23, 1940 by an agreement entered into between the company and the union of Local 710 for the benefit of and on behalf of the employees whereby it was agreed that the strike of the employees therefor called by the local union be called off; that the men return to work and the question of back pay be submitted to the right of appeal to a committee consisting of two union men, two employees and an impartial chairman appointed by J. A. Greenman, President of Labor; that checks for the amounts due the members of Local 710 be made payable to the worker and delivered to the Chicago (No. 710) Union, who will deliver the checks to the workers without deduction and get their receipts and deliver the receipts to the company; that as a result of the agreement checks payable to the order of the plaintiffs were delivered to Local 710 and to the officials of the union refused to deliver them unless each plaintiff shall permit a deduction of 25 per cent of the amount of his check; that plaintiffs have refused to comply with this request and demand the checks. Secondly, plaintiffs allege mismanagement of the union, refusal to give information or render an accounting as to the affairs of the union, etc., and, as to this aspect of the complaint, by amendment, that the action is brought "not only in their own behalf but on behalf of all other members of said Chicago Local Union No. 710." The prayer is for specific performance of the agreement and an accounting in regard to the checks and as to all financial transactions of Local 710 for the preceding 26 months, and the appointment of a receiver to take charge of the books, records and personnel property of the union.

By their answer the individual defendants deny that the agreement of December 23, 1940 was entered into, and allege that the agreement between the union and the company for the adjustment of the

3.

controversy is evidenced by a written agreement of December 31, 1940, which contains no provision to deliver the checks "without deduction;" that after receipt of the checks a meeting of the employees interested was held and the employees advised by certain of the defendants as union officials that the plaintiffs had been guilty of violation of the wage scale and the executive board found the men were to be fined a sum equivalent to 25 per cent of the back pay recovered; that the deduction was to cover the fines and reimbursement of the union for expenses in the arbitration; that the plaintiffs filed no claim against the defendants within the union; that the constitution and by-laws of Local 710 and the International provide for the trial of such complaints before the Executive Board of the Joint Council of the General Executive Board of the International; that having failed to exhaust their rights within the union plaintiffs are without remedy in the courts. The answer denies all charges of mismanagement, failure to give information or to account and that the action is a representative action as to the members of Local 710, because plaintiffs' interests are contrary to those of the membership of the union. During the pendency of the suit the money found by the arbitrators to be owing to the plaintiffs was deposited with the clerk of the court.

The master made a report finding that the rights of the parties were governed by the written agreement of December 31, 1940; that the plaintiffs were subject to a penalty for violation of the wage scale of the union and that the latter could have levied fines against them - (not that it did); that the claim of the union for reasonable expenses aggregated approximately \$3,500; the amount recovered for the employees was \$12,000; that the plaintiffs did not exhaust their remedies within the union and there is no evidence that this would have been a useless effort on their part; that there is no proof of allegations relating to threats or other charges against

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controversy is evidenced by a written agreement of December

31, 1940, which contains no provision to deliver the check

"without deduction;" that after receipt of the check a meeting

of the employees interested was held and the employees advised by

certain of the defendants as union officials that the plaintiffs

had been guilty of violation of the wage scale and the executive

board found the men were to be fined an amount equivalent to 10 per

cent of the back pay recovered; that the reduction was to cover

the fines and reimbursement of the union for expenses in the

arbitration; that the plaintiffs filed a suit against the de-

fendants within the union; that the constitution and by-laws of

Local 710 and the International provide for the trial on such

complaints before the Executive Board of the Joint Council of the

General Executive Board of the International; that having failed

to exhaust their rights within the union plaintiffs are without

remedy in the courts. The answer denies all charges of mismanage-

ment, failure to give information or to account and that the action

is a representative action as to the members of Local 710, because

plaintiffs' interests are contrary to those of the membership of

the union. During the pendency of the suit the money found by the

arbitrators to be owing to the plaintiffs was deposited with the

clerk of the court.

The master made a report finding that the rights of the

parties were governed by the written agreement of December 31, 1940;

that the plaintiffs were subject to a penalty for violation of the

wage scale of the union and that the latter could have levied fines

against them - (not that it did); that the claim of the union for

reasonable expenses aggregated approximately \$5,500; the amount re-

covered for the employees was \$12,000; that the plaintiffs did not

exhaust their remedies within the union and there is no evidence in

that this would have been a useless effort on their part; that there

is no proof of allegations relating to threats or other charges against

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the defendants. Objections and exceptions to the master's report were overruled and a decree entered dismissing the complaint pursuant to the recommendations of the master. By this decree the master's fees were ordered to be deducted from the fund on deposit with the clerk and the remainder of the sum directed to be paid one-fourth to Local 710 and the balance to the attorneys for the plaintiffs - each plaintiff to receive his proportionate share.

The evidence shows that at a meeting held in the office of a United States conciliator in Chicago on December 23, 1940 between officers of the company and certain officers and members of Local 710 and the attorneys for the respective parties, it was agreed that the strike be called off and the matters in dispute be submitted to arbitration as alleged in the complaint. The attorney for the company made a memorandum of what he considered to be the consensus of the meeting and read it to those present. This memorandum was received in evidence and according to its terms the checks were to be delivered to the respective plaintiffs without deduction. There is a dispute as to whether the parties agreed to the statement as read. In any event, on December 31, 1940 the respective counsel of Local 710 and the company entered into a written agreement, signed by them, reciting the deposit of \$10,000 by the company as security for the payment to the members of the Local of such amounts as may be found due them for back pay, to be determined by a committee of five, composed of two persons to be selected by the union, two by the company and one by the head of the United States Conciliation Service, Department of Labor - payment of the amounts, if any, found to be due such members to be made by checks payable to the order of the employees and delivered to the union for distribution and the obtaining of the receipts. This agreement was approved by the union and the company by their respective presidents. As heretofore noted, this agreement did not

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the defendants. Objections and exceptions to the master's report were overruled and a decree entered dismissing the complaint pursuant to the recommendations of the master. By this decree the master's fees were ordered to be deducted from the fund on deposit with the clerk and the remainder of the fund was to be paid one-fourth to Local 710 and the balance to the attorneys for the plaintiffs - each plaintiff to receive his proportionate share.

The evidence shows that at a meeting held on June 10, 1940 at a United States Conciliator in Chicago on June 10, 1940 between officers of the company and certain officers and attorneys of Local 710 and the attorneys for the respective parties, it was agreed that the strike be called off and the matter be referred to arbitration as alleged in the complaint. The attorney for the company made a statement of fact in connection with the meeting and read it to the group. This memorandum was received in evidence and according to the testimony the checks were to be delivered to the respective plaintiffs without deduction. There is a dispute as to whether the parties agreed to the statement as read. In any event, on December 10, 1940 the respective counsel of Local 710 and the company entered into a written agreement, signed by them, reciting the deposit of \$10,000 by the company as security for the payment to the union of the Local of such amounts as may be found due them for back pay, to be determined by a committee of five, composed of two persons to be selected by the union, two by the company and one by the Local of the United States Conciliation Service, Department of Labor - payment of the amounts, if any, found to be due such amount to be made by check payable to the order of the employees and delivered to the union for distribution and the obtaining of the receipts. This agreement was approved by the union and the company by their respective presidents. As heretofore noted, this agreement did not

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provide for the delivery of the checks to the members "without deduction." Subsequently, on March 17, 1941, a stipulation of agreement signed by the arbitrators named by the respective parties and attested by the appointee of the head of the United States Conciliation Service was executed, certifying to the completion of the arbitration under the agreement of December 31, 1940 between the company and Local No. 710. It is apparent from the conduct of the parties that neither the company nor the officers of the union considered the memorandum made by the attorney for the company at the meeting of December 23, 1940 as the contract of the parties or contemplated that it should be the final agreement between them. It was not signed by anyone and, until after the commencement of this litigation, no one had a copy of it except the attorney who made it. The formal written agreement of December 31, 1940 was signed by the attorney who made the memorandum and by the attorney for the union. The arbitrators as well as the representative of the government, acting as chairman, recognized the latter agreement as the one prescribing their duties and obligations and as the agreement under which the awards made by them should be paid. This agreement, therefore, rather than the oral negotiations of December 23, 1940 must govern and fix the rights of the parties. Sallo v. Boas, 327 Ill. 145, 149; Daytona Gables Co. v. Glen Flora Co., 345 Ill. 371, 394. There is another fatal objection to plaintiffs' demand for the full amount of these checks. The 25 per cent deduction was claimed by the union and by the individual defendants as officers of the union, but not individually. A decree denying the right to make the deductions would affect the rights of the union - that is, the individual members of the union other than plaintiffs, to this amount. These members are not made parties to this suit in so far as this claim is concerned. Their interests are adverse to those of plaintiffs and

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they are necessary parties. Texas Company v. Hollingsworth, 375 Ill. 536, 543. Plaintiffs did not sue the officials in a representative capacity, and on appeal expressly state, "No relief is sought against the union." It follows that the court did not err in refusing to decree delivery of the respective checks or the proceeds thereof to the plaintiffs.

A consideration of the evidence in the record does not show that the finding of the master that plaintiffs failed to prove their charges of mismanagement of the union, failure to account, etc., is against the manifest weight of the evidence. The trial court has approved this finding. This court cannot interfere with that conclusion. Stasch v. Romza, 387 Ill. 67.

Having disposed of the case on its merits, we do not consider the question raised by the individual defendants as to the necessity of plaintiffs exhausting remedies within the union and appealing to the Executive Board of the Joint Council or the General Executive Board of the International before resorting to a court. Neither have we considered plaintiffs' objection to a part of the master's fees because of the form of his certificate, as the fees do not appear to be excessive. Defendants' counter-appeal raised a question of the division of the costs. As conceded by them, this is a matter of discretion in the trial court, governed by the circumstances of the case. We cannot say that its action was an abuse of discretion.

Before concluding this opinion we are obliged to take notice of the brief filed by plaintiffs. The rules of this court limit the first brief of the appealing party to 75 pages. Plaintiffs presented a motion for leave to file a longer brief. Defendants objected and this court denied the leave requested. A consideration of the questions involved after briefs were filed confirms the correctness of our ruling. However, plaintiffs have

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They are more very similar, "EXAM" and "EXAM".

375 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

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contravened the rules and the ruling of the court by crowding into each of the last 24 pages of their brief 12 additional lines, thereby making a brief almost 8 pages in excess of that permitted by the court. We would have been justified in striking the brief, but preferred to consider the merits of the case, fearful that delay might result in detriment to the parties. Loyal Arcanum v. Green, 237 U. S. 531, 546.

The decree is affirmed.

ATTEST.

Matchett and O'Connor, JJ., concur.

contravened the rules and the ruling of the court of appeals
into each of the last 24 pages of their briefs is
lines, thereby making a brief which is more than
permitted by the court. It would be a waste of time
the brief, but ordered to be corrected. It is
but that delay in the result in the district court.

Arguing v. Wrenn, 247 U.S. 1, 18 S.Ct. 1007.

The decree is affirmed.

Roberts and W. Connor, 117, 1000.

43120 } CONSOLIDATED.
43121 }

WINIFRED F. FLEMING,
Appellee,

v.

THOMAS DONOVAN and NELLIE
DONOVAN,
Appellants.

APPEAL FROM

MUNICIPAL COURT OF CHICAGO.

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WINIFRED F. FLEMING,
Appellee,

v.

NELLIE DONOVAN,
Appellant.

APPEAL FROM

MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendants Thomas Donovan and Nellie Donovan, husband and wife, appealed from a judgment for \$775 and costs entered against them on a trial before the court February 16, 1944. Shortly after the appeal was perfected the trial court denied defendants' motion to vacate the judgment and grant a new trial, and on plaintiff's motion vacated the judgment, dismissed the cause as to Thomas Donovan and entered judgment against Nellie Donovan for \$775 and costs. From this judgment Nellie Donovan has appealed. The appeals have been consolidated.

Plaintiff's claim is based upon an alleged loan of \$850 said to have been made to the defendants in July 1926. At that time plaintiff was a saleswoman for a realty company. She claims to have sold the Donovans two lots at a price of about \$5,216, with a down payment of one-fourth; that Thomas Donovan gave her \$50 cash, and the next night or so Mrs. Donovan gave her \$404 in cash, and she, the plaintiff, advanced the remaining \$850 in cash to complete the down payment. The alleged loan was never

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CONSOLIDATED

THOMAS D. JONES
JONES

v.

THOMAS D. JONES
JONES

THOMAS D. JONES
JONES

THOMAS D. JONES
JONES

THOMAS D. JONES
JONES

Plaintiff's claim is based on the fact that

and wife, deceased, from the time of their marriage

against him of a total sum of \$10,000.00, which

of the two sums of \$10,000.00 and \$10,000.00, and

motion to set aside the judgment and award a new

little motion vacated the judgment, and award a new

Thomas Jones and entered judgment against him for the

\$500 and costs. That this judgment, after being

The amount due is \$500.00.

Plaintiff's claim is based on the fact that

said to have been made to the defendant in 1968, and

time plaintiff was a salesman for a party of 100. He

to have sold the defendant two lots at a price of \$10,000.00

with a down payment of one-fourth; that Thomas Jones

\$500 cash, and the next night or so later Jones

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evidenced by any written instrument. Plaintiff further claims that in 1928 she was paid \$25 on account by Mrs. Donovan in the kitchen of the Donovan home; that she made one request for a note, which was never given; that in 1938 Mrs. Donovan with her daughter went to plaintiff's office to secure the latter's assistance in getting a job for the daughter; that on this occasion Mrs. Donovan paid \$50 on account of the 12-year-old loan and received a receipt prepared by a lawyer in the same suite with plaintiff. Suit was commenced March 30, 1943.

Neither the original contract of purchase of the real estate nor the original or copy of the alleged receipt - plaintiff claiming to have a copy of same - were offered or received in evidence. Mrs. Donovan denied having signed the contract for the purchase of the real estate, making any payments to plaintiff thereunder, getting a loan or making any of the payments claimed by plaintiff on the alleged loan. Her husband also denied receiving any loan from the plaintiff or making any payments thereon, or having any knowledge of any payments claimed to have been made by Mrs. Donovan.

The attorney (not of record on the appeals) who is said to have drawn the alleged receipt for the 1938 payment, was one of the attorneys instituting the suit for plaintiff. An office associate conducted the trial. Without withdrawing the appearance of his firm as attorneys for plaintiff, the attorney testified to drawing a receipt sometime in 1938 covering the payment of some money by Mrs. Donovan to plaintiff on account of some real estate transaction, and that some money - he did not know how much - was paid to the plaintiff. The giving of testimony on behalf of his client by a lawyer of record has been repeatedly condemned by the courts, and the testimony so given held to be entitled to little, if any, weight. Wiederhold v. Wiederhold, 305 Ill. 429; Beninca v. Nardiello, 320 Ill. 181; Crescio v. Crescio, 365 Ill. 393; Pippert v.

evidenced by any written instrument. Plaintiff further of the fact that in 1928 she was paid \$25 on account by Mrs. Donovan in the kitchen of the Donovan home; that she made one request for a note, which was never given; that in 1928 Mrs. Donovan with her daughter went to plaintiff's office to secure the first advance in getting a job for the daughter; that on this occasion Mrs. Donovan paid \$30 on account of the 1-10-10 loan and received a receipt prepared by a lawyer in the same office with plaintiff, but was commenced March 30, 1929.

Neither the original contract of purchase of the real estate nor the original or copy of the alleged receipt - Plaintiff claiming to have a copy of same - were offered or received in evidence. Mrs. Donovan denied having at any time contract for the purchase of the real estate, making any reference to plaintiff thereunder, getting a loan or making any of the payments claimed by plaintiff on the alleged loan. Her husband also denied receiving any loan from the plaintiff or making any payments thereon, or having any knowledge of any payments claimed to have been made by Mrs. Donovan.

The attorney (not of record on the docket) who is said to have drawn the alleged receipt for the 1-10-10 loan, was one of the attorneys instituting the suit for plaintiff. An office associate conducted the trial. Without mentioning the substance of his firm as attorneys for plaintiff, the attorney testified to drawing a receipt sometime in 1928 covering the payment of some money by Mrs. Donovan to plaintiff on account of some real estate transaction, and that some money - he did not know how much - was paid to the plaintiff. The giving of testimony on behalf of his client by a lawyer of record has been repeatedly condemned by the courts, and the testimony so given held to be entitled to little, if any, weight. Lieberhold v. Lieberhold, 305 Ill. 429; Gemina v.

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Schiele, 315 Ill. App. 563; Goldberg v. Georgeadis, 320 Ill. App. 689 (abst.). The case therefore must rest upon the testimony of the plaintiff, contradicted by the testimony of Mrs. Donovan and her husband.

Circumstances appearing from the evidence militate against plaintiff's claim. She was and is an experienced business woman. Except for a single request for a note, she made no effort to have the alleged loan evidenced by writing. She permitted the claim to lie dormant for 10 years from the first alleged payment to the second payment in 1938. These payments were made voluntarily, without any "dunning" by the plaintiff. She then waited almost 5 years before bringing suit. No effort was made to get the original of the alleged receipt prepared by the attorney or to introduce the copy claimed to be in the hands of the plaintiff. The burden of establishing her case rested upon the plaintiff and she did not meet it. Peaslee v. Glass, 61 Ill. 94; Brougham v. Paul, 138 Ill. App. 455, 464; Butler v. Whiteman, 196 Ill. App. 320.

The parties have devoted considerable space in their briefs to the right of the trial court to vacate the original judgment after the appeal therefrom was perfected by service of a notice of appeal. It appears from the record that both parties appeared before the trial court without questioning its jurisdiction and argued the merits of their respective positions. Each sought vacation of the first judgment, but for different reasons. Neither party should now be permitted to question the jurisdiction of the court.

The original judgment having been vacated, the first appeal is dismissed without costs to either party. The second judgment, being against Nellie Donovan only, is reversed and judgment for her entered here.

FIRST APPEAL DISMISSED WITHOUT
COSTS TO EITHER PARTY;
JUDGMENT AGAINST NELLIE DONOVAN
REVERSED AND JUDGMENT FOR HER HERE.

Matchett and O'Connor, JJ., concur.

43137

LILLIAN M. PRICE, Administratrix
to Collect of the Estate of ARNO
T. RONER, Deceased.

Appellant,

v.

CAROLINE G. MEIER,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Petitioner, as administratrix of the estate of Arno T. Roner, deceased, appeals from an adverse judgment entered by the Circuit court on appeal of respondent Caroline G. Meier from a judgment of the Probate court in citation proceedings instituted by the administratrix, directing respondent to pay to the administratrix the sum of \$7,565.37 and surrender all shared of stock in the A. T. Roner Investment Company held by her.

In the Circuit court, trial was had before the court without a jury, resulting in a finding that title to all of the property in question was in the respondent as the result of gifts inter vivos, except as to the proceeds of a check for \$2,469.31 which was used by respondent in paying certain bills of the deceased at his request. The administratrix complains that the judgment was against the weight of the evidence and that the court erred in allowing the respondent to testify in her own behalf.

The record shows that the deceased, Arno T. Roner, was 77 years of age when he died, on March 17, 1943. The respondent was about 62 years of age. Roner's wife died in 1938. At that time respondent was a widow. Roner and respondent had known each other about 30 years. They belonged to the same lodge and their families had visited back and forth until the death of Mrs. Roner. After

WILLIAM H. PRISON, Administrator
to Collect of the Estate of ARNO
T. RONER, Deceased.

Appellant,

v.

CAROLINE G. LEVIN,

Appellee.

MR. PRESIDING JUDGE WILLIAM H. PRISON, JR., of the Court.

Petitioner, as administrator of the estate of ARNO T. RONER, deceased, appeals from an order entered by the Court on appeal of respondent Caroline G. Levin from a judgment of the Probate Court in relation to the estate of ARNO T. RONER, deceased, directing respondent to pay to the administrator the sum of \$7,835.00 and interest.

of stock in the A. T. Roner Investment Company held by her.

In the circuit court, trial was had before the court

without a jury, resulting in a finding that title to all of the

property in question was in the respondent as the result of either

inter vivos, except as to the proceeds of a check for \$4,431.21

which was used by respondent in paying credit in full of the

deceased at his request. The administrator contended that the

judgment was against the weight of the evidence and that the court

erred in allowing the respondent to testify in her own behalf.

The record shows that the deceased, ARNO T. RONER, was 77

years of age when he died, on March 17, 1942. The respondent was

about 62 years of age. Roner's wife died in 1935. At that time

respondent was a widow. Roner and respondent had known each other

about 30 years. They belonged to the same lodge and their families

had visited back and forth until the death of Mrs. Roner. After

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that time the relations between Roner and respondent became more intimate. They were frequently together. Roner was in the real estate business and respondent frequently drove his car for him on business trips. They went to church together and Roner talked of marriage and the purchase of a home in which to live. They inspected a number of residences but none was purchased.

Respondent testified that in 1940 Roner gave her a package of papers, including the stock in the Roner Investment Company, certificates of beneficial interest in a certain trust, and two mortgage notes, saying "These are yours, I want you to have them." That at other times he gave her checks for small amounts; on October 1, 1942 he gave her government bonds for \$200, a check for \$400, the proceeds of which were to be used as a down-payment upon the purchase of a home and which she subsequently returned to Roner; that later he gave her a check for \$2,469.31, with directions to expend same in the payment of his bills, including funeral and burial expenses, and to retain the balance as her own. A receipt dated October 1, 1942, signed by respondent and acknowledging receipt from Roner of \$5,000. "For the purchase of a dwelling, residence or any other piece of real estate in Cook County" was received in evidence. On the back of the receipt was a notation in Roner's hand writing - "Cash \$4400, Bonds 200, Check 400, - \$5000." Respondent admitted the receipt of the check and bonds but denied receipt of the \$4400 in cash. She said that she signed the receipt at Roner's request, he telling her facetiously that she was signing her life away. The former attorney of Roner, called by the administratrix, testified that he held the stock in the Roner Investment Company until the termination of his employment by Roner, some time in the year 1942, when the stock was delivered to Roner but no receipt taken. On the motion for new trial the administratrix attempted to impeach respondent's testimony by a purported steno-

that time the witness had a conversation with the defendant and the defendant told him that he was going to leave the country and that he was going to live in the United States. The witness said that he was not sure if the defendant was telling the truth or not, but he was not going to say anything about it.

The witness said that he was not going to say anything about it, but he was not going to say anything about it. The witness said that he was not going to say anything about it, but he was not going to say anything about it.

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graphic transcript of respondent's testimony in the Probate court, not certified by the court. No other testimony relating to the transactions between respondent and Roner was received or offered. The trial court accepted respondent's version of these transactions and found the issues as to all of the property in her favor. There can be no question of the sufficiency of her testimony to establish gifts inter vivos.

Under the statute governing citation proceedings in the Probate court (Ill. Rev. Stat. 1943, Chap. 3, pars. 335-339), the respondent, when permitted to testify, is the witness of the court (Keshner v. Keshner, 376 Ill. 354, 362), and the extent of the examination rests largely in the discretion of the court. Having called the respondent for the purpose of showing the delivery to her of the property in question, it would be manifestly unfair to deny her the privilege of explaining the circumstances attending such delivery, and the court did not err in receiving such testimony. The weight to be given the testimony was to be determined by the trial court, who had the advantage of seeing the witness and of observing her demeanor when testifying. Roner had no close relatives. His long acquaintance with respondent, his relations with her after 1938 and her attendance upon him during his last illness afford a reasonable basis for the alleged gifts. We cannot say that the finding of the trial court is against the weight of the evidence.

On appeal the administratrix urges that if the delivery of the property was such as to constitute a valid gift, the transfer should be set aside because of the insolvency of Roner and his estate. There is nothing in the record to indicate that the proceeding was prosecuted on this theory. There is no evidence in the record as to Roner's financial condition in 1940, or even in 1942, and unless Roner was insolvent at the time of the respective

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gifts his creditors could not complain. Furthermore, it has long been the law in this state that an administrator or executor, standing in the shoes of the deceased, cannot institute proceedings to set aside conveyances by the deceased fraudulent as to creditors. Choteau v. Jones, 11 Ill. 300; White v. Russell, 79 Ill. 155; Sifford v. Cutler, 244 Ill. 234. In Keshner v. Keshner, supra., the Sifford case is commented upon as being^{based} upon the narrow terms of the statute relating to the sale of real estate of decedents. However, the court did not then have before it for determination the question here presented, namely, the right of an administrator or executor to set aside the fraudulent conveyances of the deceased.

The judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

4.

Gifts his creditors could not complain. Furthermore, it has

long been the law in this state that an administrator or executor,

standing in the shoes of the decedent, cannot institute proceedings

to set aside conveyances by the decedent made in contemplation

Chosen v. Jones, 11 E.L. 200; White v. Smith, 11 E.L. 100;

Wittford v. Butler, 24 E.L. 234. In Wittford v. Butler, 24 E.L. 234,

passed

the Wittford case is considered upon its merits and the court

of the statute relating to the sale of real estate of decedent.

However, the court did not then give notice of the application

the question here presented, namely, the right of an administrator

or executor to set aside the fraudulent conveyances of the decedent.

The judgment is affirmed.

WITNESSES

Wattchett and O'Connell, C. J. concur.

43093

UNITED FILM AD SERVICE, INC.,
a corporation,
Appellee,

v.

BANKERS LIFE & CASUALTY COMPANY,
a corporation, and CARROLL DEAN
MURPHY & COMPANY, a corporation,
Defendants.

BANKERS LIFE & CASUALTY COMPANY,
a corporation,
Appellant.

320 TA 813
APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendant, Bankers Life & Casualty Company, appeals from a judgment of \$1,768.41, entered on motion of plaintiff February 10, 1944.

Material facts are that plaintiff produces and distributes commercial advertising by films in motion pictures, with offices at Kansas City. Its president is William H. Hendren, Jr. Defendant and appellant, Bankers Life & Casualty Company, sells life insurance throughout the United States. Its offices are in Chicago; John MacArthur, is its president. Defendant Carroll Dean Murphy & Company is an advertising agency in Chicago; Mr. Whitely, its vice president, and he and Mr. Murphy active in its business.

Plaintiff sued the insurance company and the advertising agency together November 2, 1942. It filed a complaint of three counts. It claimed first on February 19, 1942, for work, labor and material and postage and cartage in connection therewith a balance of \$1,768.41; secondly, against the insurance company, that at the request of its duly authorized agent plaintiff distributed to numerous motion picture theatres inquiry cards directed to defendant insurance company, as part of an advertising campaign conducted from March 4 to May 6, 1942, at the

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ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED

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1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the situation.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

1. The above information is being furnished to you for your information only. It is not to be used for any other purpose without the express written consent of the FBI.

The defendant, [redacted], [redacted] Company, [redacted]

THIRTEEN TO FIFTEEN TO SEVENTEEN, IN ORDER TO THROUGHOUT A MONTH

[illegible]

Ref: 100-443887-1000

U.S. Department of Health and Human Services

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Approved: _____ Date: _____

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THE UNITED STATES OF AMERICA

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE

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During campaign conducted from March 4 to May 6, 1944, at the

agreed price of \$1,475.11, a balance of \$770.64. The third count claimed for like services by plaintiff at the special request of Carroll Dean Murphy & Company, for which that agency agreed to pay plaintiff a like compensation on which \$770.64 was due.

The insurance company denied liability under any count and averred that Carroll Dean Murphy & Company, in connection with its own business, entered into the contract with plaintiff; that said plaintiff conducted the business of an advertising agency; that Carroll Dean Murphy & Company was also a similar agency; that by Custom undertakings on the part of an advertising agency are not binding on the advertisers for whom services are rendered, except when special arrangements are made directly between the parties contracting with the agency and the advertiser; that plaintiff knew or should have known this; further, that the insurance company satisfied and discharged all obligations between it and Carroll Dean Murphy & Company by payment, and that the plaintiff and the agency were independent contractors.

Replications were filed, the cause put at issue, the court heard the evidence and December 29, 1943, made a finding in favor of the insurance company as to the first and second counts. As to the third count there was a finding in favor of plaintiff against Carroll Dean Murphy & Company for \$770.64, and judgment was entered upon each finding. Carroll Dean Murphy & Company did not move for a new trial or to set aside the finding against them and have not appealed from the judgment. However, January 7, 1944, plaintiff filed a motion for a new trial as to counts I and II and for judgment notwithstanding on these two counts. The motion alleged the findings were contrary to the manifest weight of the evidence, to the law and to the law

agreed price of \$1,475.15, a balance of \$70.04. This third
account claimed for like services by plaintiff at the special
request of Carroll Dean Murphy, a company, for which that agency
agreed to pay plaintiff a like commission on which \$70.04
was due.

The insurance company denied liability under any count
and averred that Carroll Dean Murphy & Company, in connection
with its own business, entered into the contract with plaintiff;
that said plaintiff contracted the business of an advertising
agency; that Carroll Dean Murphy & Company was also a similar
agency; that by custom understandings on the part of an adver-
tising agency are not binding on the advertiser for whom ser-
vices are rendered, except when special arrangements are made
directly between the parties contracting with the agency and
the advertiser; that plaintiff knew or should have known this;
further, that the insurance company executed and delivered
all obligations between it and Carroll Dean Murphy & Company
by payment, and that the plaintiff and the agency were de-
pendent contractors.

Replections were filed, the cause was set for trial, the
court heard the evidence and December 29, 1943, made a finding
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counts. As to the third count there was a finding in favor of
plaintiff against Carroll Dean Murphy & Company for \$70.04.
and judgment was entered upon each finding. Carroll Dean Murphy
& Company did not move for a new trial or to set aside the find-
ing against them and have not appealed from the judgment. How-
ever, January 8, 1944, plaintiff filed a motion for a new trial
as to counts I and II and for judgment notwithstanding on these
two counts. The motion alleged the findings were contrary to
the manifest weight of the evidence, to the law and to the law

and evidence. January 14, 1944, the court granted a new trial as to count I and February 10 entered an order denying the motion of plaintiff for judgment on that count notwithstanding, granted plaintiff's motion for a new trial and vacated and set aside the judgment entered for defendant on that count. Upon further consideration motion for judgment was allowed and an order entered: "Judgment is hereby entered in favor of the plaintiff and against the defendant, Bankers Life & Casualty Company, a corporation, upon Count I of the Complaint in the amount of \$1,768.41." From this judgment the Bankers Life & Casualty Company brings this appeal.

Defendant argues a motion for judgment "notwithstanding the verdict" is inappropriate where a judgment is based on findings of the court. This is technically true under Section 68 (1) of the Civil Practice Act. Reardon v. Abraham Lincoln Life Ins. Co., 288 Ill. App. 633; Stephens-Adamson Mfg. Co. v. Firemen's Ins. Co., 257 Ill. App. 443. On this record, however, we think that unimportant. A new trial was granted within the time limited by statute. This had the effect of setting aside the judgment and the court had jurisdiction to pass on the issues on the merits.

The question we are concerned with is whether the judgment for \$1,768.41, or any part of it, was due from defendant insurance company to plaintiff film company. The first impression of the trial court was that the insurance company was not so liable. The court found Carroll Dean Murphy & Company liable under the third count for \$770.64 which did not include the \$1,768.41 mentioned in the first count, and they have not appealed. On the record we hold that the liability of the insurance company was to Carroll Dean Murphy & Company and not to plaintiff.

MacArthur, called as a witness by plaintiff under section

60 of the Civil Practice Act, testified that the insurance company began the advertising campaign late in 1941. He said (and this was uncontradicted) that the business was placed with Carroll Dean Murphy & Company, an advertising agency in Chicago; that he dealt with Mr. Whiteley and Mr. Murphy of that firm and authorized a campaign with an allotment of \$10,000 to \$12,000. The insurance company did not have a written contract with Carroll Dean Murphy & Company. Carroll Dean Murphy & Company outlined the proposed plan of campaign and he (MacArthur) said, "Go ahead." The plan of procedure was to first have some moving pictures made, write some script, then show the pictures at local theatres and have ushers distribute postcards containing information about the company's policies of insurance to people as they left the theatre. The cards were supposed to be returned to the insurance company by persons interested. To stimulate interest among theatre managers a contest was provided for with prizes of \$500. These cards distributed were numbered or keyed so that they might be identified. Mr. Whiteley dictated the letter authorizing the prize, MacArthur signed it. Whiteley directed MacArthur to send 100,000 cards to plaintiff at Kansas City saying that he (Whiteley) had approved the cost of \$1.50 per thousand. March 6, 1942, Whiteley sent to MacArthur statements he had received from plaintiff for numbering the cards and for express and postage charges in the matter. He asked that the insurance company remit directly to plaintiff. Defendant did not do so. May 8, 1942, Carroll Dean Murphy & Company sent a letter to defendant insurance company enclosing certain invoices of plaintiff and computing the total amount thereof, which up to that date indicated the insurance company owed Carroll Dean Murphy & Company the total sum of \$3,027.95. These items did not include charges for printing

60 of the Civil Practice Act, testified that the insurance company began the advertising campaign late in 1941. He said (and this was uncontested) that the business was placed with Carroll Dean Murphy & Company, an advertising agency in Chicago; that he dealt with Mr. Whitley and Mr. Murphy of that firm and authorized a campaign with an allotment of \$10,000 to \$15,000. The insurance company did not have a written contract with Carroll Dean Murphy & Company. Carroll Dean Murphy & Company outlined the proposed plan of campaign and he (MacArthur) said, "no objection." The plan of procedure was to first have some moving picture made, with some script, then show the pictures at local theaters and have posters distributed postpaid to contain information about the company's policies of insurance to people as they left the theater. The cards were supposed to be returned to the insurance company by persons interested. To stimulate interest among theater managers a contest was provided for with prizes of \$50. These cards distributed were supposed to be returned to the insurance company by mail. Mr. Whitley directed the latter according to the plan. MacArthur signed it. Whitley directed MacArthur to send \$10,000 cards to plaintiff at Kansas City asking that he (Whitley) not approved the cost of \$1.50 per thousand. March 6, 1942, Whitley sent to MacArthur statement he had received from plaintiff for numbering the cards and for express and postage charges in the matter. He asked that the insurance company remit directly to plaintiff. Defendant did not do so. May 6, 1942, Carroll Dean Murphy & Company sent a letter to defendant insurance company enclosing certain invoices of plaintiff and computing the total amount thereof, which up to that date indicated the insurance company owed Carroll Dean Murphy & Company the total sum of \$3,027.92. These items did not include charges for printing

and numbering and handling the cards. June 3, 1942, the insurance company made settlements with Carroll Dean Murphy & Company for all the expenses of the campaign incurred to that time for \$4,000. The insurance company gave a check for that amount, which was paid. The notation is on the invoice in the handwriting of MacArthur's secretary. The whole amount which Carroll Dean Murphy & Company claimed to be due from the insurance company at that time was \$4,700. MacArthur says Mr. Whiteley came to his office with a handful of bills, including the items due for printing and postage and screening charges, totaling more than \$4,700, and MacArthur settled the whole matter by giving his check for \$4,000. The evidence shows that the agreement between the insurance company and its agency was that the agency was to submit to the insurance company the original bills from the plaintiff in order to demonstrate to MacArthur that the usual commission of fifteen per cent had not been added thereto. MacArthur says that the first time he knew what the cost was to be for numbering the cards was on February 10, 1942, when he received the invoices from the agency. He says he did not receive any bill directly from plaintiff; that all the invoices he received were from Carroll Dean Murphy & Company. In a rough way he knew the number of theatres showing the pictures - a mere estimate. He did not know the amount paid to the individual theatre. His testimony is to the effect that the entire matter was left in the agency's hands and that the insurance company was no party to the contract with plaintiff.

Hendren's testimony is not contrary. He said he first contacted concerning the campaign by Macey & Claner. He learned Whiteley, "with Carroll Dean Murphy & Company," had a client who wanted a motion picture advertising job. He consulted Whiteley and theatre owners and advised what could be done. Mr. Whiteley communicated this information to MacArthur

and numbering and handling the cards. June 2, 1944, the insurance company made settlements with Carroll Bean Murphy & Company for all the expenses of the campaign referred to that time for \$4,000. The insurance company gave a check for that amount, which was paid. The notation in the invoice in the handwriting of MacArthur's secretary, The whole amount which Carroll Bean Murphy & Company claimed to be due from the insurance company at that time was \$4,000. According to Mr. Whiteley came to his office with a bundle of bills, including the items due for printing and postage. The items were totaling more than \$4,000, and he said that he had been told by giving him a check for \$4,000. The notation shows that the agreement between the insurance company and the agency was that the agency was to submit to the insurance company the original bills from the printer in order to be reimbursed for MacArthur that the usual commission of 10% was not to be paid. It has been agreed therefore, MacArthur said that he had not known what the cost was to be for handling the campaign, and on February 10, 1944, when he received the invoice from the agency, he says he did not receive any bill directly from MacArthur; that all the invoices he received were from Carroll Bean Murphy & Company. In a rough way he knew the number of the items showing the pictures - a more exact one. He did not know the amount paid to the individual theatre. His testimony is to the effect that the entire matter was left in the agency's hands and that the insurance company was no party to the contract with MacArthur. Henderson's testimony is not contrary. He said he had first contacted concerning the campaign by Mack A. Glazer. He learned Whiteley, "with Carroll Bean Murphy & Company," had a client who wanted a motion picture advertising job. He contacted Whiteley and theatre owners and advised what could be done. Mr. Whiteley communicated this information to MacArthur.

and it was decided to offer prizes to the theatre managers. When Whiteley and Hendren needed 100,000 cards for the campaign Whiteley contacted MacArthur and got him to send the postcards direct from the insurance company. The price was submitted by plaintiff to Whiteley and approved by him. Hendren then discussed with Whiteley how the charge was to be billed and asked him if MacArthur understood that billings for special services were going to be made to Bankers Life & Casualty Company. Whiteley asked him to send the bills to Carroll Dean Murphy & Company so that he could check the bills against what had been ordered. So, also, when the million cards first mentioned were needed, plaintiff's president requested Whiteley to find out how soon MacArthur could supply them, and Whiteley asked him to find the cost of delivery in Kansas City. The bids were submitted to Whiteley, and Whiteley procured approval from MacArthur. The goods were billed by plaintiff as instructed by Whiteley and when plaintiff did not receive the money, on May 18, 1942, it wrote directly to MacArthur, attaching copies of invoices and asking payment. As a matter of fact, Hendren says, on actual outlays for distribution "we were adding 25% for ourselves and 25% for Carroll Dean Murphy." Hendren also says plaintiff never authorized Carroll Dean Murphy & Company to compromise on the amount. As a matter of fact, Hendren was in Chicago several times. He says he suggested to Whiteley that he and MacArthur should get together and talk over some of the details. Whiteley, however, told Mr. Hendren it was difficult to make a definite appointment with MacArthur. They were never able to see each other. Hendren says on the day of the luncheon appointment he could not be in Chicago. He "thinks," however, MacArthur understood who was to do the job; that plaintiff was going to do all the printing and numbering of the cards and distribute them to the theatres, etc. It was not until

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May 18 that he had occasion to write directly to MacArthur and send him copies of the bills plaintiff had rendered. That was about the end of the campaign.

The campaign was not a success. April 15, 1942, Whiteley, for Carroll Dean Murphy, wrote: "I am upset about this campaign. To date, only 1,052 inquiries have been received and only 127 policies sold. The cost per inquiry is running around \$4 and the cost per sale about \$30. Therefore, we are going to have to make some changes and eliminate theatres in the larger cities and towns. Perhaps the best way would be to suspend the whole operation for a month or so until we get set. I am going to talk with Fred and Gibbs about this and will notify you. At the moment, MacArthur is very blue about the way the campaign is going." Whiteley says MacArthur knew nothing about minute movies. He says, "I will tell you how that \$4,000 compromise occurred. We are under obligations as an advertising agency to pay bills. I don't know how many times Mr. Hendren and I talked about collecting the bill. So I went up to MacArthur - the amount owed to Carroll Dean Murphy was, roughly speaking, \$3,000; the amount owed to Hendren was \$1,700. Mr. MacArthur started telling me what a complete flop this was. He said he had got no results from it, and he had some fantastic cost of inquiry, and he said 'I want to get this thing settled.' Frankly, I wasn't going to be with Carroll Dean Murphy much longer and I wanted to get it off the books. He offered me \$3,000. I said \$4,000 and we will see that everything is taken care of and you are absolutely in the clear, because I realized that we had enough profit in there to take, even if we took a \$700 loss, Carroll Dean Murphy would still have made money on the account. *** The \$3,027.95 invoice did not include the items for printing and keying. I definitely did not have authorization from Mr. Hendren to collect for him. I was

not authorized by Mr. Hendren to do what I did. I placed the order and therefore I felt if I placed the order I certainly was entitled to collect for it."

A review of the whole evidence shows that, with the knowledge of plaintiff, the insurance company gave the contract for this advertising to Carroll Dean Murphy & Company; that the defendant insurance company was liable to them for all bills as their agents; that the insurance company and Carroll Dean Murphy & Company had a right to make the settlement of June 3, and that plaintiff's right of action is against Carroll Dean Murphy & Company and not the defendant Bankers Life & Casualty Company; that the defendant insurance company is not liable to plaintiff on this contract, and that the judgment entered on the finding under the first count must be reversed with judgment here for defendant insurance company.

JUDGMENT REVERSED AND
JUDGMENT HERE.

Niemeyer, P. J., concurs.
O'Connor, J., dissents.

not authorized by Mr. Hansen to do what I did. I placed the order and therefore I felt it I placed the order I certainly was entitled to collect for it."

A review of the whole evidence shows that, in the knowledge of plaintiff, the insurance company gave the contract for this advertising to Carroll Loan Agency & Company; that the defendant insurance company was liable to them for all bills as their agents; that the insurance company and Carroll Loan Agency & Company had a right to make the settlement of June 3, and that plaintiff's right of action is against Carroll Loan Agency & Company and not the defendant insurance company; that the defendant insurance company is not liable to plaintiff on this contract, and that the judgment entered on the finding under the first count must be reversed with judgment here for defendant insurance company.

JUDGMENT REVERSED AND
JURY SET ASIDE.

Witnesses, J. J. Connor,
J. J. Connor.

43113

EDITH L. MITCHELL,
Appellee,

v.

DAVID SWESNIK and SWESNIK LOAN CO.,
INC., a corporation,
Appellants.

137
APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

324 I.A. 814

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover the value of United States Treasury Bonds to the amount of \$1500, of which she was the owner. In her statement of claim she averred the bonds were stolen from her about June 3, 1936, by some unknown person, and that defendants, or one of them, obtained possession thereof but not as a holder in due course, and not in good faith or for value, and that defendants had notice of defects in the title of the persons negotiating the bonds to them.

There was another like count except that it alleged defendants were pawn brokers and that some unknown person pawned the bonds with one of the defendants. Defendants denied they were not holders for value, in due course, or that they had notice of any defect in the title of the seller.

There was trial by a jury, which returned a verdict for plaintiff, with damages assessed at \$2,069.75 and costs of suit. Motions for judgment notwithstanding the verdict, for a new trial and in arrest of judgment were denied. Judgment was entered on the verdict and the defendants appeal.

Defendants contend that when the bonds were offered to them for sale they made inquiry at the Federal Reserve Bank, were told the bonds were all right, and that they had no notice of any infirmity

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in the title of the seller when they purchased the bonds, and as they were negotiable and defendants bought same before maturity they took good title thereto.

The defendants also argue there was no evidence connecting defendants or any one of them with the transaction and say that the burden of proving lack of title in the defendants, or one of them, and that the purchase was made in bad faith and not in due course of business and not for value was upon the plaintiff.

Plaintiff on the other hand contends that the burden of proving all these elements of defense was on the defendants and that they should have investigated the seller of the bonds to determine the validity of his title to the same.

It was stipulated on the trial that the United States bonds were negotiable instruments; that on February 4, 1936, the same were stolen from plaintiff's safety deposit box in the bank at Birds Eye, Indiana; that about that time the bonds were brought to the pawn shop of defendants at Harrison and State Streets in Chicago by a well-dressed stranger with a name something like Kalich, who said he came from Milwaukee. Defendant David Swesnik said he took the bonds and the next day gave Kalich a diamond ring and \$2400 in currency for them. Swesnik said he went to the bank and got the cash with which to make the payment. No record was made of the transaction. Swesnik's testimony, also, is the only evidence tending to show what consideration was given for the bonds. The pawn shop in question is operated in the name of Swesnik Loan Company. It is a corporation. His son and daughter own all the capital stock. The purpose of the corporation in its organization certificate is stated to be: "To operate a new and second-hand clothing store and to sell and buy new and second-hand clothing, trunks, suitcases, cameras, musical instruments, and to do a general business in the sale and purchase of new and second-hand merchandise of all kinds, and to make loans secured by pledges on merchandise and chattels of all kinds."

in the title of the seller when they purchased the goods, and as they were negotiable and defendants bought same before maturity they took good title thereto.

The defendants also argue there was no evidence concerning defendants on any one of them with the exception and say that the burden of proving lack of title in the defendants, on one of them, and that the purchase was made in bad faith and not in the course of business and not for value was upon the plaintiff.

Plaintiff on the other hand contends that the burden of proving all these elements of defense was on the defendants and that they should have investigated the value of the goods to determine the validity of his title to the same.

It was stipulated on the trial that the following facts were negotiable instruments; that on January 1, 1935, the goods were stolen from plaintiff's warehouse by the bank of Chicago, Indiana; that about that time the bonds were brought to the bank of defendants at Harrison and James Street in Chicago by a well-dressed stranger with a name resembling "John", who said he came from Milwaukee. Defendant David G. Smith said he took the bonds and the next day gave them a diamond ring and \$500 in

currency for them. G. Smith said he went to the bank and the cash with which to make the payment. The money was made of the same action. G. Smith's testimony, also, is the only evidence tending to show what consideration was given for the bonds. The bank then in question is operated in the name of Smith Loan Company. It is a corporation. Its son and daughter own all the capital stock. The purpose of the corporation in its organization certificate is stated to be: "To operate a new and second-hand clothing store and to sell and buy new and second-hand clothing, trunks, suitcases, cameras, musical instruments, and to do a general business in the sale and purchase of new and second-hand merchandise of all kinds, and to make loans secured by pledges on merchandise and chattels of all kinds."

3.

In his sworn answer Swesnik said the defendant corporation was the purchaser of the bonds. On cross-examination this answer was read to him and he said the answer was true. On the same examination he said he was acting for himself, individually, and not for the corporation. He also said the corporation had a checking account but that he (the witness) did not have any such account. Swesnik further said he gave Kalich in part payment for the bonds a diamond ring, which at the time of the trial was worth \$5,000 but worth only \$1,000 when he received it. He said that in 1936 it was worth \$750 a carat. In 1929 it was pawned by a colored man to Swesnik for \$500. The Swesnik Loan Company was incorporated in 1933. It took over all the business, including the diamond ring. Swesnik said he took the ring from the loan company on foreclosure for a loan of \$500. This sale took place in 1935 or 1936, and he said he paid \$1,000 for that ring. At first he said he had a record of the sale, but when the record was called for he did not produce it. Swesnik made no investigation of Kalich, who brought in the bonds. He said he went to the Federal Reserve Bank and interviewed a person of unknown name about the bonds and an unknown person from an undisclosed source telephoned saying the bonds were all right. As a matter of fact, expert evidence showed the bonds were worth \$1600 in cash, which was \$100 more than par. Commission on the sale would be \$1.25.

These are, it is believed, the material facts disclosed upon the trial. Defendants made a motion for a directed verdict in their behalf, which was denied, and we think rightly.

Section 59 of the Negotiable Instruments Law (Ill. Rev. Stat., 1943, Chap. 98, par. 79) is:

Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

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This suit was by the owner of the bonds from whom they were stolen, and the exception in the last sentence of the statute is therefore not applicable. When the plaintiff proved by a stipulation introduced in evidence that she was the owner of the bonds and that the same were stolen from her she had certainly shown there was a defect in the title of the defendants or of some person from whom they acquired the bonds. Thereupon the burden was cast upon the defendants to prove that they were holders in due course and that burden would only be sustained by affirmative proof that defendants took the bonds in good faith and for value, and that at the time they acquired the bonds they had no notice of any defect in the title.

In Owens v. Nagel, 334 Ill. 96, the Supreme Court said:

"Under section 59 of the statute, in the first instance, defendant in error was deemed prima facie to be a holder in due course. This presumption continued until evidence was produced by plaintiff in error to show the contrary. If no such evidence was produced the presumption continued that defendant in error was a holder in due course. If evidence was introduced tending to show that the title of Erisman was defective, then the burden was on defendant in error to prove that he, or some person under whom he claimed, acquired title in due course."

So, in Heller v. Martin, 319 Ill. App. 209, this court, in reversing and remanding a judgment for defendant, said:

"We hold defendant had a right to show, as she offered to do, that the "note" was obtained through false representations of the payee, that the consideration for which it was given had wholly failed and the article she purchased was entirely worthless. When and if this showing was made, the presumption plaintiff was a holder in due course disappeared and the burden was cast upon it to show that the purchase of the "note" was made under such circumstances as to make it a holder in due course under the statute."

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In Daniels on Negotiable Instruments, 7th Ed. (1935) Vol. III, §1732, that author says:

"The legal presumption is that the holder of a note is not a finder or thief but a bona fide transferee for value. When, however, the loss by the original owner, or the theft from him, is proved, the burden of proof shifts, and the holder must show that he acquired it bona fide for value, and before maturity, or from some one who had a perfect title."

In 11 C. J. S. 501 Bonds §118 T., it is said:

"*** where bonds have been stolen, it will be presumed that they continued in the hands of a holder without title until the contrary is shown."

Defendants complain that the instructions to the jury were inconsistent because by one instruction the court told the jury that plaintiff was required by law to prove her case by a preponderance of the evidence before she could recover, and that if this was not so proved or the evidence was evenly balanced so the jury were in doubt and unable to say on which side the preponderance was, then in either case the verdict should be not guilty; further, that it was admitted the bonds (the subject matter of the suit) were stolen from the plaintiff, Edith L. Mitchell, on February 4, 1936, and that they were afterward acquired by one of the defendants on June 3, 1936, and that they were thereafter sold and the proceeds retained by the defendant; that "unless the defendant acquiring the bonds was a holder of the bonds in due course, it or he is liable to pay plaintiff the value thereof. In order to find that either defendant was a holder in due course of the bonds in suit, you must find from the preponderance of the evidence that said defendant took the bonds in good faith and for value, and that at the time said defendant acquired the bonds, said defendant had no notice of any infirmity therein or any defect in the title of the

In Daniels on Negotiable Instruments, Vol. 1, (1932) Vol. 1.

III, §1782, that author says:

"The legal presumption is that the holder of a note is not a finder or thief but a bona fide transferee for value. When, however, the loss by the original owner, or the thief from him, is proved, the burden of proof shifts, and the holder must show that he acquired it bona fide for value, and before maturity, or from some one who had a perfect title."

In 11 C. J. 2, 501 Bonds 1112, it is said:

"*** where bonds have been stolen, it will be presumed that they contained in the hands of a holder without title until the contrary is shown."

Defendants complain that the instructions to the jury were inconsistent because by one instruction the court told the jury that plaintiff was required by law to prove beyond a reasonable doubt the evidence before him could recover, and that if this was not so proved or the evidence was evenly balanced as to the jury were in doubt and unable to say on which side the preponderance was, then in either case the verdict should be not guilty; further, that it was admitted the bonds (the subject matter of the suit) were stolen from the plaintiff, William L. Witterell, on February 4, 1936, and that they were afterward acquired by one of the defendants on June 2, 1936, and that they were thereafter sold and the proceeds retained by the defendant; that "unless the defendant acquiring the bonds was a holder of the bonds in due course, it or he is liable to pay plaintiff the value thereof. In order to find that either defendant was a holder in due course of the bonds in suit, you must find from the preponderance of the evidence that said defendant took the bonds in good faith and for value, and that at the time said defendant acquired the bonds, said defendant had no notice of any infirmity therein or any defect in the title of the

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person from whom said defendant acquired them. The theft having been admitted in this case, the burden is on the defendant who acquired the bonds to prove by a preponderance of the evidence that it, or the person from whom it claims to have acquired the title to the bonds, was a holder in due course - that is, that it acquired the bonds in good faith and for value, and without notice of any defect in the title of the person for whom it acquired the bonds. If said defendant has not sustained that burden, then the plaintiff is entitled to recover the value of the bonds. In determining whether or not either defendant acquired the bonds in good faith, you may well consider all the circumstances under which the bonds were so acquired. If you find from the evidence and the instructions of the Court that the bonds were acquired by the defendant, Swesnik Loan Co., Inc., or David Swesnik, in bad faith, or were not acquired in good faith, your verdict must be for the plaintiff against the defendant acquiring the bonds in the amount of \$1,600 with interest at 5% per annum from June 3, 1936."

The instruction that in the first instance the burden of proof was on the plaintiff to prove her case is not at all inconsistent with the law applicable when it is admitted, as it is here, that plaintiff's bonds were stolen from her. By the terms of the statute, the fact of the theft being conceded, the burden of proof at once shifts to the defendant to show by a preponderance of the evidence that he took the property for value, in good faith and without notice of any defect in title. This is the rule as stated in the opinions of this and the Supreme Court as well as the courts of other states. Fonseannon v. Lewis, 327 Ill. 455, 461; Heller v. Martin, 319 Ill. App. 209; Bell v. McDonald, 308 Ill. 329; Industrial Loan & Trust Co. v. Bell, 300 Ill. App. 502, 505-07; Ecks v. Montanara, 152 N. Y. Supp. 1010-11; Renfrow v. Kramer, 341 Ill. 398, 406; Harter v. People's Bank of Buffalo, 221 App. Div. (N.Y.) 122, 126-7, 223 N. Y. Supp. 118, 122,

person from whom said defendant acquired them, the court having been admitted in this case, the burden is on the defendant to establish the bonds to prove by a preponderance of the evidence that it, or the person from whom it claims to have acquired the title to the bonds, was a holder in due course - that is, that it acquired the bonds in good faith and for value, and without notice of any defect in the title of the person for whom it acquired the bonds. If said defendant has not sustained that burden, then the plaintiff is entitled to recover the value of the bonds. In determining whether or not either defendant acquired the bonds in good faith, you will consider all the circumstances under which the bonds were acquired. If you find from the evidence and the instructions of the court that the bonds were acquired by the defendant, directly from the plaintiff, or David Swenick, in bad faith, or were not acquired in good faith, your verdict must be for the plaintiff against the defendant, and the bonds in the amount of \$1,500 with interest at 6 per cent from June 2, 1926."

The instruction that in the first instance the burden of proof was on the plaintiff to prove her case is not at all inconsistent with the law applicable when it is admitted, as it is here, that plaintiff's bonds were stolen from her. By the terms of the statute, the fact of the theft being conceded, the burden of proof as to the title to the bonds is shown by a preponderance of the evidence that he took the property for value, in good faith and without notice of any defect in title. This is the rule as stated in the opinions of this and the Supreme Court as well as the courts of other states. *Conner v. Lewis*, 327 Ill. 455, 451; *Heller v. Martin*, 315 Ill. App. 501; *Hill v. McDonald*, 308 Ill. 529; *Industrial Loan & Trust Co. v. Hill*, 300 Ill. App. 502, 505-07; *Wick v. Montanara*, 152 N. Y. Supp. 1010-11; *Genrow v. Kerner*, 341 Ill. 398, 400; *Harter v. People's Bank of Buffalo*, 321 App. Div. (N.Y.) 122, 125-7, 323 N. Y. Supp. 118, 122.

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123. The question of good faith was in this case peculiarly for the jury.

Defendants were not in the business of buying and selling bonds. Kalich, who sold them, lived in Milwaukee not Chicago. No explanation is made as to why it was deemed necessary to make the trip from Milwaukee to Chicago in order to dispose of these United States bonds. The case is not unlike Harter v. People's Bank of Buffalo, 221 App. Div. (N.Y.) 122, 126-7. Unusual and peculiar circumstances in a case of this kind have always been for the jury. Murray v. Beckwith, 48 Ill. 391, 394-5; Hodson v. Eugene Glass Co., 156 Ill. 397, 404-5. It is not argued the verdict is against the manifest weight of the evidence.

The judgment of the trial court will be affirmed.

AFFIRMED.

Niemeyer, P. J., and O'Connor, J., concur.

183. The question of good faith was in this case peculiarly for the jury.

Defendants were not in the business of buying and selling bonds. Kelich, who sold them, lived in Illinois not Chicago. An explanation is made as to why it was deemed necessary to make the trip from Milwaukee to Chicago in order to dispose of these United States bonds. The case is not unlike Hunter v. People's Bank of Buffalo, 221 App. Div. (N.Y.) 122, 123-4, 124-5, 125-6, 126-7, 127-8, 128-9, 129-30, 130-1, 131-2, 132-3, 133-4, 134-5, 135-6, 136-7, 137-8, 138-9, 139-40, 140-1, 141-2, 142-3, 143-4, 144-5, 145-6, 146-7, 147-8, 148-9, 149-50, 150-1, 151-2, 152-3, 153-4, 154-5, 155-6, 156-7, 157-8, 158-9, 159-60, 160-1, 161-2, 162-3, 163-4, 164-5, 165-6, 166-7, 167-8, 168-9, 169-70, 170-1, 171-2, 172-3, 173-4, 174-5, 175-6, 176-7, 177-8, 178-9, 179-80, 180-1, 181-2, 182-3, 183-4, 184-5, 185-6, 186-7, 187-8, 188-9, 189-90, 190-1, 191-2, 192-3, 193-4, 194-5, 195-6, 196-7, 197-8, 198-9, 199-200, 200-1, 201-2, 202-3, 203-4, 204-5, 205-6, 206-7, 207-8, 208-9, 209-10, 210-11, 211-12, 212-13, 213-14, 214-15, 215-16, 216-17, 217-18, 218-19, 219-20, 220-21, 221-22, 222-23, 223-24, 224-25, 225-26, 226-27, 227-28, 228-29, 229-30, 230-31, 231-32, 232-33, 233-34, 234-35, 235-36, 236-37, 237-38, 238-39, 239-40, 240-41, 241-42, 242-43, 243-44, 244-45, 245-46, 246-47, 247-48, 248-49, 249-50, 250-51, 251-52, 252-53, 253-54, 254-55, 255-56, 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1122-1123, 1123-1124, 1124-1125, 1125-1126, 1126-1127, 1127-1128, 1128-1129, 1129-1130, 1130-1131, 1131-1132, 1132-1133, 1133-1134, 1134-1135, 1135-1136, 1136-1137, 1137-1138, 1138-1139, 1139-1140, 1140-1141, 1141-1142, 1142-1143, 1143-1144, 1144-1145, 1145-1146, 1146-1147, 1147-1148, 1148-1149, 1149-1150, 1150-1151, 1151-1152, 1152-1153, 1153-1154, 1154-1155, 1155-1156, 1156-1157, 1157-1158, 1158-1159, 1159-1160, 1160-1161, 1161-1162, 1162-1163, 1163-1164, 1164-1165, 1165-1166, 1166-1167, 1167-1168, 1168-1169, 1169-1170, 1170-1171, 1171-1172, 1172-1173, 1173-1174, 1174-1175, 1175-1176, 1176-1177, 1177-1178, 1178-1179, 1179-1180, 1180-1181, 1181-1182, 1182-1183, 1183-1184, 1184-1185, 1185-1186, 1186-1187, 1187-1188, 1188-1189, 1189-1190, 1190-1191, 1191-1192, 1192-1193, 1193-1194, 1194-1195, 1195-1196, 1196-1197, 1197-1198, 1198-1199, 1199-1200, 1200-1201, 1201-1202, 1202-1203, 1203-1204, 1204-1205, 1205-1206, 1206-1207, 1207-1208, 1208-1209, 1209-1210, 1210-1211, 1211-1212, 1212-1213, 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1304-1305, 1305-1306, 1306-1307, 1307-1308, 1308-1309, 1309-1310, 1310-1311, 1311-1312, 1312-1313, 1313-1314, 1314-1315, 1315-1316, 1316-1317, 1317-1318, 1318-1319, 1319-1320, 1320-1321, 1321-1322, 1322-1323, 1323-1324, 1324-1325, 1325-1326, 1326-1327, 1327-1328, 1328-1329, 1329-1330, 1330-1331, 1331-1332, 1332-1333, 1333-1334, 1334-1335, 1335-1336, 1336-1337, 1337-1338, 1338-1339, 1339-1340, 1340-1341, 1341-1342, 1342-1343, 1343-1344, 1344-1345, 1345-1346, 1346-1347, 1347-1348, 1348-1349, 1349-1350, 1350-1351, 1351-1352, 1352-1353, 1353-1354, 1354-1355, 1355-1356, 1356-1357, 1357-1358, 1358-1359, 1359-1360, 1360-1361, 1361-1362, 1362-1363, 1363-1364, 1364-1365, 1365-1366, 1366-1367, 1367-1368, 1368-1369, 1369-1370, 1370-1371, 1371-1372, 1372-1373, 1373-1374, 1374-1375, 1375-1376, 1376-1377, 1377-1378, 1378-1379, 1379-1380, 1380-1381, 1381-1382, 1382-1383, 1383-1384, 1384-1385, 1385-1386, 1386-1387, 1387-1388, 1388-1389, 1389-1390, 1390-1391, 1391-1392, 1392-1393, 1393-1394, 1394-1395, 1395-1396, 1396-1397, 1397-1398, 1398-1399, 1399-1400, 1400-1401, 1401-1402, 1402-1403, 1403-1404, 1404-1405, 1405-1406, 1406-1407, 1407-1408, 1408-1409, 1409-1410, 1410-1411, 1411-1412, 1412-1

43150

FRANK O. KOEPKE,
Appellant,

v.

PETER J. SCHUMACHER, et al.,
Defendants,

ALICE CAMPO,
Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

32-1A-315

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order entered March 16, 1944, striking his answer to the petition of Alice Campo and denying his motion to set the same order aside.

The suit was brought by Koepke May 7, 1942, to foreclose a mortgage made May 21, 1926, to secure the payment of a note for \$3500.00 of the same date, due five years from date. The note and trust deed were executed by Benjamin F. Gove and Mattie K. Gove, his wife.

By an amendment filed July 20, 1942, Alice Campo (whose maiden name was Alice Freed) was made defendant, the amendment asserting she claimed some interest in the premises. Three times a summons against her issued to the sheriff and was returned "not found". An affidavit was then filed under Section 14 of the Civil Practice Act (Smith Hurd Anno. Stat., Chap. 110, par. 138.) Publication was made, a certificate thereof filed and her default taken November 21, 1942. On November 24, 1942, a decree of foreclosure was entered. The decree found \$4,375.99 due, with interest and costs, and directed sale of the premises in case of further default. There was further default, and after due notice, as provided by the decree and statute, a sale to plaintiff Koepke

43150

FRANK O. KOPPEL,
Appellant,

v.

PETER J. SCHNEIDER, et al.,
Defendants,

ALICE CAMPO,
Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order entered March 18, 1944,

striking his answer to the petition of Alice Campo and denying

his motion to set the same order aside.

The suit was brought by Koppel May 7, 1942, to recover

a mortgage made May 21, 1928, to secure the payment of a note for

\$2500.00 of the same date, due five years from date. The note and

trust deed were executed by Benjamin F. Dove and Nellie A. Dove,

his wife.

By an amendment filed July 20, 1943, Alice Campo (now

maiden name was Alice Freed) was made defendant, the amendment

asserting she claimed some interest in the premises. Three times

a summons against her issued to the sheriff and was returned "not

found". An affidavit was then filed under Section 14 of the Civil

Practice Act (Smith and Ann. Stat., Chap. 110, par. 138.)

Publication was made, a certificate thereof filed and her default

taken November 21, 1942. On November 24, 1942, a decree of fore-

closure was entered. The decree found \$4,375.99 due, with interest

and costs, and directed sale of the premises in case of further

default. There was further default, and after due notice, as

provided by the decree and statute, a sale to Plaintiff Koppel

2.

was made on December 23, 1942, for \$4,366.60, and a certificate of sale issued to him and recorded. The period of redemption expired March 23, 1944.

February 16, 1944, Mrs. Campo filed her petition to vacate the foreclosure decree and for leave to defend. It has been suggested the petition was filed under Section 50 of the Civil Practice Act (Smith Hurd Anno. Stat., Chap. 110, par. 174) but the year allowed for such a proceeding under that statute had already expired when her petition was filed. It has been suggested that the petition was in the nature of a bill of review, but it was not filed within the time allowed for bringing such a bill and does not contain the necessary allegations of a bill of that kind. Gray v. First National Bank, 294 Ill. App. 62; Rosmerl v. Sevin, 295 Ill. App. 345; Ulrich v. Ulrich, 299 Ill. App. 460; People v. Joliet Trust & Savings Bank, 315 Ill. App. 111. It is suggested that the trial court in entering the order appealed from treated the petition as one in the nature of a writ of error coram nobis, but this does not seem probable in view of the decision in Frank v. Salomon, 376 Ill. 439. The record does not show any statement by the trial judge as to his reasons for the ruling. Petitioner's attorney disclaims any of these theories and contends the proceeding was purely under the power inherently vested in any court to vacate a void decree or judgment at any time, before or after term, where the same was procured by a fraud on its jurisdiction. Nash v. Park Castles Apartment Corp., 384 Ill. 68, 76; Gordon v. Gordon, 35 Ariz. 357, 278 Pac. 375; 34 C. J. §484, p. 253; 15 R. C. L. p. 692, with many other authorities are cited. The general principle is, of course, unquestioned.

The petition of February 16, 1944, recited the former proceedings and averred the affidavit of non-residence as to her was insufficient to confer jurisdiction over her for several reasons. She says her residence could have been ascertained by

was made on December 23, 1942, for \$4,888.00, and a certificate of sale issued to him and recorded. The period of redemption expired March 23, 1944.

February 18, 1944, when Gumbo filed her petition to

vacate the foreclosure decree and for leave to defend. It has

been suggested the petition was filed under Section 30 of the

Civil Practice Act (Smith-Kund Amendment, 1935, 1937, 1941)

but the year allowed for such a proceeding under the statute had

already expired when her petition was filed. It was then

suggested that the petition was in the nature of a bill of review,

but it was not filed within the time allowed for review, even a

bill and does not contain the necessary allegations of a bill of

that kind. Gray v. First National Bank, 205 Ill. App. 2d 100, 101

v. Levin, 205 Ill. App. 2d 344; Blitch v. Blitch, 205 Ill. App. 2d 441

People v. Joliet Prison, 205 Ill. App. 2d 111, 112, 113

suggested that the trial court in setting aside the order of sale

from treated the petition as one in the nature of a bill of review

coram nobis, but this does not seem to be the view of the

decision in Frank v. Belmont, 205 Ill. App. 2d 110, 111, 112, 113

any statement by the trial judge as to his reasons for the ruling.

Petitioner's attorney declines any of these theories and contends

the proceeding was purely under the power inherently vested in any

court to vacate a void decree or judgment at any time, before or

after term, where the same was procured by a fraud or the judgment

decision. Wash v. Park Garage Apartment Corp., 204 Ill. App. 2d 101

Gordon v. Gordon, 35 App. 387, 378 Ill. App. 2d 375; 34 C. L. 1484

p. 253; 18 R. C. L. p. 692, with many other authorities are cited.

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The petition of February 18, 1944, recited the former

proceedings and averred the affidavit of non-residence as to her

was insufficient to confer jurisdiction over her for several

reasons. She says her residence could have been ascertained by

3.

reasonable diligence and effort; that the affidavit does not set forth what efforts were made to ascertain her place of residence and alleged nothing to show that due inquiry was in fact made to find her or diligent inquiry to ascertain her place of residence. She also averred that she had a good defense to the foreclosure suit, in that the suit was barred by the Statute of Limitations; that Albert R. Freed her father was theretofore the record owner of the premises, and that a forged deed had been recorded, purporting to convey title to the premises to Morton D. Freed, and that by reason of these facts the decree of November 24, 1942, "was procured by the fraud of plaintiff and for the purpose of defrauding petitioner". She prayed the decree should be set aside as to her and she given leave to answer, and for further relief.

Plaintiff moved to strike her petition. His motion was denied. He then filed an answer, verified. March 15, 1944, she moved to strike his answer. Her motion was granted. March 16, plaintiff moved to vacate the order striking the answer and setting it aside. This motion was denied. Plaintiff elected to abide by the answer and refused to plead further. The court then entered an order or decree finding the equities were with the petitioner and ordered the decree of November 24, 1942, set aside as to Alice Campo, and that she be given leave to appear and defend and answer the amended complaint within twenty days. From this order plaintiff filed notice of appeal to this court April 8, 1944. Proof of service of the notice of appeal was filed on the same day.

We have examined the affidavit of non-residence on which the publication in this case was based and examined the numerous authorities cited. We hold that the objections made to the affidavit are not valid and are not of such a nature as to render the decree void.

reasonable diligence and effort; that the plaintiff did not

set forth what efforts were made to ascertain the name of

residence and alleged attempt to show that the plaintiff was in fact

made to find her or diligent inquiry to ascertain her name or

residence. She also averred that she had a good belief as to the

foreclosure suit, in that the suit was barred by the statute of

limitations; that about 1942 or thereabouts the foreclosure suit

record owner of the premises, and that a firm had been formed

recorded, purporting to convey title to the premises to one of

them, and that by reason of these facts the record owner of the

54, 1942, "was procured by the fraud of plaintiff and the

purpose of obtaining possession of the premises was to

be set aside as to her and the other parties to the same, and that

relief.

Plaintiff moved to strike her petition. The court

denied. He then filed an answer, verified, dated 12, 1942, and

moved to strike his answer. The court ordered, dated 12,

plaintiff moved to vacate the order striking his answer and setting

it aside. His motion was denied. Plaintiff moved to strike

the answer and refused to plead further. The court ordered, dated

order or decree finding the petition was filed with the petitioners and

ordered the decree of November 4, 1942, set aside as to all

Gampo, and that one of them leave to answer and defend and answer

the amended complaint within ten days. From this order plain-

tiff filed notice of appeal to this court April 5, 1944, from

of service of the notice of appeal was filed on the same day.

We have examined the affidavit of non-prosecution or which

the publication in this case was based and examined the numerous

authorities cited. We hold that the objections made to the

affidavit are not valid and are not of such a nature as to render

the decree void.

4.

The affidavit in question appears to have been made by Reuel H. Grunewald, attorney for plaintiff. It names a number of persons made defendants and avers that these (naming them) and "reside or have gone out of this state/on due inquiry they cannot nor can any of them be found so that process cannot be served upon them or any of them; that upon diligent inquiry their place of residence cannot, nor can the place of residence of any of them be ascertained; and affiant further states that the last known place of residence of such defendants is as follows: * * * Alice Campo, 1428 N. Hoyne Avenue, Chicago, Illinois".

Defendant says the statement in the affidavit that she resided or had gone out of the state was incorrect; that she resided in Chicago on May 7, 1942, and has resided in this city continuously since; that the averment in the affidavit that her last known place of residence was 1428 North Hoyne Avenue, Chicago, Illinois, was incorrect; that she had never resided at a place known as 1428 North Hoyne Avenue, Chicago, Illinois, at any time, and that there is not now or was not at any time thereafter such a number as 1428 North Hoyne Avenue, Chicago, Illinois. This averment seems to be corroborated by the return of the sheriff. That fact, however, does not render the affidavit invalid. In Schaefer v. Kienzel, et al., 123 Ill. 430, an affidavit of non-residence stated the residence of Paulina Schaefer as "20th St. Louis Avenue, St. Louis, Missouri", and the objector said that it was uncertain whether "20th" referred to the number of the house or to 20th Street and St. Louis Avenue. The Supreme Court said:

"The requirement of the statute is, that the affidavit shall state 'the place of residence of such defendant, if known.' The affidavit does state this, and nothing more was required."

In Malaer v. Damron, 31 Ill. App. 572, defendants sought by writ of error to reverse a foreclosure decree on the ground

5.

the affidavit of residence was defective. As to one of the defendants the court so held, because it merely stated "his place of residence is unknown", omitting any averment that "upon diligent inquiry his place of residence cannot be ascertained". As to two other defendants it was urged the affidavit was defective in that their places of residence were given on information and belief only and also because there was no such postoffice as Segual, Texas, named in the affidavit as their place of residence. The court said:

"If the complainant sought and obtained such information as enabled him to state upon oath he believed the place of residence of defendants to be the place named in the affidavit, that was sufficient: Hannas v. Hannas, 110 Ill. 53; * * * In addition to the facts certified to of mailing copy of notice to the place named in the affidavit as the residence of these defendants, the decree recites that the clerk had mailed such copy to Constantine Malaer and Mahala Springs at their place of residence, and finds the court had jurisdiction of the parties. We think they were properly in court and the statute was complied with in respect of all the steps required to be taken in order to charge these defendants with notice of the pendency of the suit, and bring them within the jurisdiction of the court."

In Burke v. Donovan, 60 Ill. App. 241, on appeal from a decree of foreclosure it was urged the affidavit of non-residence was fatally defective in that it failed to show the postoffice address of defendant. The opinion says:

"But the affidavit does show where the defendants reside and that is sufficient. It is not necessary to state the street and number; but it is deemed a compliance with the statute to state that a defendant resides at such a place, as, 'at St. Louis, Missouri,' or, 'at San Francisco, California.' Hannas v. Hannas, 110 Ill. 53, and Schaefer v. Kienzel et al., 123 Id. 430."

The effect of all these cases is that the street and number at which a defendant lives is not a material and necessary

the affidavit of residence was defective. As to one of the defendants the court so held, because it merely stated the place of residence is unknown, without any averment that diligent inquiry has been made to ascertain the place of residence. As to two other defendants it was urged the affidavits are defective in that their places of residence were stated as unknown and relief only and also because there was no such averment as to Texas, named in the affidavit as their place of residence. The court said:

"If the complainant sought to obtain such information as enabled him to state upon oath he believed the place of residence of defendant to be the place named in the affidavit, that was sufficient; Hanna v. Hanna, 110 Ill. 53; * * * In addition to the facts certified to of mailing copy of notice to the place named in the affidavit as the residence of those defendants, the court ruled that the clerk had mailed such copy to John Hanna, Michael and Anna Hanna at their place of residence, and that the court had jurisdiction of the parties. We think they were properly in court and the statute was complied with in respect of all the steps required to be taken in order to change these defendants with notice of the pendency of the suit, and bring them within the jurisdiction of the court."

In Burke v. Donovan, 65 Ill. App. 311, on appeal from a decree of foreclosure it was urged the affidavits of non-residence were fatally defective in that it failed to show the correct address of defendant. The opinion says:

"But the affidavit does show where the defendant resides and that is sufficient. It is not necessary to state the street and number; but it is deemed a compliance with the statute to state that a defendant resides at such a place, as, 'at St. Louis, Missouri,' or, 'at San Francisco, California.' Hanna v. Hanna, 110 Ill. 53, and Schaefer v. Michael et al., 135 Ill. 451."

The effect of all these cases is that the street and number at which a defendant lives is not a material and necessary

6.

part of the statutory affidavit.

Defendant further objects to the affidavit that while it states "due inquiry" and "diligent inquiry" had been made, the language of the statute is that it must be "an affidavit showing" due inquiry, etc. This, he says, means to demonstrate, to prove and to establish, and the language used by the court in Spalding v. Spalding, 3 Howard's Practice, 297, is said to be applicable here. A distinction is drawn between a mere statement and a "showing", and we are asked to hold that an affidavit must not only state due inquiry was made but must state in some detail what was done in order to ascertain the residence of the defendant. The form of affidavit used in this case is one which has been widely used in proceedings relating to the title of lands in Chicago and Cook County for many years. We are disposed to hold it sufficient. Many things might properly be done to ascertain the residence of any person. Certainly an unending search should not be necessary. We think it was not the intention of the legislature in enacting this statute to require an affidavit giving in detail an account of the search made. We do not know of any Illinois case which so holds. The affidavit was, we hold, sufficient. We hold the court had jurisdiction of defendant Campo.

After the record was filed in this court, defendant Campo moved to dismiss the plaintiff's appeal and in support of her motion filed affidavits tending to show a conspiracy between plaintiff and some of the defendants to defraud her. Of course, no court will allow its process to be used for that purpose, but no such question, so far as this record shows, was raised in the trial court. This court is not one of original jurisdiction. It is designed to review and, if necessary, reverse and correct errors of the courts of nisi prius. Sections of the practice act which have attempted to authorize this court to take evidence have been held invalid by the Supreme Court for that reason. Schmidt v. Life

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cient. We hold the court had jurisdiction of defendant Campo.

After the record was filed in this court, defendant Campo

moved to dismiss the plaintiff's appeal and in support of her

motion filed affidavits tending to show a conspiracy between plain-

tiff and some of the defendants to defraud her. Of course, no

court will allow its process to be used for that purpose, but no

such question, so far as this record shows, was raised in the trial

court. This court is not one of original jurisdiction. It is

designed to review and, if necessary, reverse and correct errors

of the courts of first instance. Sections of the practice act which

have attempted to authorize this court to take evidence have been

held invalid by the Supreme Court for that reason. Schmidt v. Life

7.

Assurance Society, 376 Ill. 183. Much less would it be permitted an appellate tribunal to substitute affidavits for evidence. The motion to dismiss the appeal is denied.

We hold the affidavit of plaintiff's attorney was sufficient to confer jurisdiction on the court; that the time for filing a bill of review or petition to set aside under the statute had expired, and that the writ of error coram nobis is inapplicable to a chancery proceeding. It follows that the trial court was without jurisdiction to enter the order appealed from. It will, therefore, be reversed.

REVERSED.

Niemeyer, P. J., and O'Connor, J., concur.

43184

LAWRENCE EBERT and ANN EBERT,
Appellants,

v.

CITY OF CHICAGO, a municipal corporation,
Appellee.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

32-1A-915²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiffs sued in tort, claiming damages in the sum of \$500. The statement of claim averred that plaintiffs were the owners of an automobile, in which they were traveling east on Fullerton Avenue in the City of Chicago, that the defendant city possessed and controlled a safety island at the intersection of Keeler Avenue and Fullerton Avenue and was charged with the care, custody and maintenance thereof; that while plaintiffs were so traveling with due care, the defendant negligently permitted the island to remain in an unlighted condition, as a result whereof the automobile struck it to their damage.

The defendant answered admitting the allegations as to maintenance and control of the island but denying any negligence connected therewith.

The cause was tried by jury. At the close of all the evidence the defendant made a motion that the jury be instructed to return a verdict in defendant's favor, which was denied. The cause was submitted to the jury and a verdict returned of guilty with damages assessed against defendant and in favor of plaintiffs in the sum of \$293.67. The city did not make a motion for a new trial but moved in writing for judgment in its favor, notwithstanding the verdict, pursuant to subsection 3a of Section 68 of the Civil Practice Act (Ill. Rev. Stat., 1943, Par. 142)

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Abstract—The purpose of this study was to determine whether the use of a computerized program could improve the accuracy of the measurement of the resting heart rate (HR) by means of a heart rate monitor (HRM). The HRM was used to measure the HR at rest during the first 10 min after waking up in the morning. The HRM was connected to a personal computer which recorded the HR every second. The HRM was also connected to a digital scale which measured the weight of the subject every second. The HRM was also connected to a digital scale which measured the weight of the subject every second. The HRM was also connected to a digital scale which measured the weight of the subject every second.

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The defendant answered questions concerning the maintenance and control of the Island in a way that connected them to the defendant.

The case was tried by jury. At the close of the evidence the defendant made a motion for a judgment to return a verdict in defendant's favor, which was denied. The case was submitted to the jury and a verdict returned in plaintiff's favor with damages assessed against defendant and in favor of plaintiff in the sum of \$252.00. The jury did not make a motion for a new trial but moved in writing for judgment in its favor, notwithstanding the verdict, pursuant to subsection 2a of section 28 of the Civil Practice Act (Ill. Rev. Stat., 1903, ch. 131).

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and Supreme Court Rule No. 22 and Municipal Court Rule No. 63A. The court granted defendant's motion and judgment was accordingly entered in favor of defendant and against plaintiffs. From that judgment they have appealed.

The sole question for determination is whether the court erred in granting the motion for judgment notwithstanding the verdict.

In Walaite v. Chicago, RockIsland & Pacific Ry. Co., 376 Ill. 59 at 61, the Supreme Court said:

"On a motion for judgment notwithstanding the verdict, in the trial court, and on an appeal from a judgment of the trial court granting such motion, the question presented is whether there is any evidence, which, taken with its intendments most favorable to appellee, tends to prove the charge of the complaint. (Sycamore Preserve Works v. Chicago and Northwestern Railway Co. supra; Miles v. Long, 342 Ill. 589; Leighton & Howard Steel Co. v. Snell, 217 id. 152.) If there is in the record evidence, which, standing alone, tends to prove the material allegations of the complaint, a motion for judgment notwithstanding the verdict, should be denied, even though upon the entire record the evidence may preponderate against the plaintiff so that the verdict in his favor cannot stand when tested by a motion for a new trial. Libby, McNeill & Libby v. Cook, 222 Ill. 206."

There is practically no conflict in the evidence.

Defendant in its answer admitted possession and control of the safety island and its duty to light it. The collision occurred about 3:30 A. M. on the morning of May 2, 1943. The safety island was unlighted at the time. Fullerton Avenue is a public highway running east and west. It is intersected by Keeler Avenue, which extends north and south. Mr. and Mrs. Ebert were returning in their automobile from a dance they had attended at the clubhouse of the Veterans of Foreign War, situated at about 4400 Keeler Avenue. Mr. Ebert was driving. He had driven automobiles in Chicago for 23 or 24 years. He

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says he was not "overly familiar" with Fullerton Avenue. The unlighted safety island was not visible until plaintiffs were within 10 or 12 feet of it.

The sole ground of the motion for judgment notwithstanding the verdict was that the plaintiffs failed to prove that the city had either actual or constructive notice of the unlighted condition of the safety island. That is the controlling question in the case.

Defendant cites only, Boender v. City of Harvey, 251 Ill. 228. The case sustains the general proposition that a city is not liable for injuries arising from defects in the streets in the absence of actual or constructive notice. This is, of course, elementary.

In two cases we have held the city liable under similar circumstances as here appear where it had actual or constructive notice. Wells v. Village of Kenilworth, 228 Ill. App. 332, and Rohwedder v. City of Chicago, 322 Ill. App. 700. In the Wells case we reversed and remanded a judgment entered on a verdict directed by the court, holding that the question of notice there was for the jury. In the Rohwedder case we held the evidence justified a finding of actual notice. In the earlier case of Seeley v. South Park Commissioners, 239 Ill. App. 653, we held the South Park Commissioners could not be held liable for the negligence of its servants for failure to have a safety island lighted, for the reason that the evidence disclosed the defendant had no notice prior to the accident that the light on the safety island was out of repair. The rule seems to apply generally. In McDermott v. McKeown Transportation Company, 263 Ill. App. 325, we held that the operator of an automobile in the nighttime was not liable for injuries resulting from his failure to have a rear lamp lighted, as required by the Motor Vehicle Act, where the failure was without notice or knowledge

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 Vehicle Act, where the failure was without notice or knowledge

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of the defect on his part. In that case a judgment for the plaintiff was reversed and remanded. In the opinion we said:

"The case was tried on the theory that there was an absolute legal duty on defendant to maintain a red light on the rear of the truck, as required by the statute, Cahill's St. ch. 95a, par. 17, if defendant would relieve itself from liability in case one were injured on account of there being no red light, and this is the contention of plaintiff. An instruction was given in the language of the statute * * *. But we think the law is not so unreasonable that there might not be circumstances which would relieve one from liability in case the rear light suddenly went out. Toledo, Wabash & Western Ry. Co. v. Beggs, 85 Ill. 80; People v. Kastings, 307 Ill. 92; Berkovitz v. American River Gravel Co., 191 Cal. 195; Yates v. Brazelton (Cal. App.), 291 Pac. 695."

The evidence in this case tends to show (and there is none to the contrary) that the city authorities received actual notice that the light on this safety island was out about five minutes prior to the time of plaintiff's accident and that its workmen were on the way to the scene of the accident to repair it at the time the accident occurred. We hold there is no proof in this record tending to show that defendant city was negligent.

Plaintiffs seem to argue that the happening of the accident shifted the burden of proof to the defendant city and cast upon it the necessity of showing that it was not negligent in any respect. We hold it was for the plaintiffs to prove their case in the first instance by a preponderance of the evidence, and as we have seen the case was not proved without evidence tending to show the defendant city had either actual or constructive notice of the defect in the safety island with reasonable time to repair it. Boenker v. City of Harvey, 251 Ill. 228.

For these reasons the judgment will be affirmed.

AFFIRMED.

Niemeyer, P. J., and O'Connor, J., concur.

43125

DAVID FAGEL,
Appellant,

v.

STERLING BRANDS, Inc., a
Corporation, and GENERAL
FINANCE CORPORATION, a
Corporation,

GENERAL FINANCE CORPORATION,
Appellee.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

321 A. 316

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendants to recover \$8,200 claimed to be due him, \$7,000 of which was money loaned defendant, Sterling Brands, Inc., and \$1,200 being the balance due plaintiff from the defendants for meat products sold and delivered by plaintiff to defendants. Defendant Sterling Brands, Inc., was defaulted for want of appearance; defendant General Finance Corporation filed its motion to strike the complaint, the motion was allowed, plaintiff elected to stand by his complaint, the suit was dismissed and plaintiff appeals.

The question for decision is the sufficiency of plaintiff's amended complaint. We hold that defendant's motion was sufficiently specific, contrary to plaintiff's contention.

The complaint is in three counts but counsel for plaintiff make no argument as to the action of the court in striking the second count. We will therefore refer to the material allegations of the first and third counts only.

In the first count it is alleged that plaintiff is a resident of Chicago and for many years has been engaged in the business of selling and furnishing meat and meat products; that defendant Sterling Brands is an Illinois corporation with its principal

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place of business in Sterling, Whiteside county, Illinois, and was engaged in the business of manufacturing meat and vegetable products; that its only customer was the United States Government; that the Finance Company is an Illinois corporation doing business in Illinois with its principal office in Chicago. That on or about the 10th of June, 1943, plaintiff was solicited by Sterling Brands for a loan of \$7,000; that on or about that day plaintiff loaned Sterling Brands the \$7,000 and at the time Sterling Brands made its notes for \$7,000, payable to plaintiff, ^{but}/through inadvertence they were not delivered to plaintiff; that after plaintiff loaned the \$7,000 to Sterling Brands it was agreed between the two defendants and plaintiff that plaintiff was to procure for defendants such meat products as were necessary for defendants to manufacture meat products to be sold to the United States Government, which manufactured product was to be turned over under Lend^aLease by the United States to Russia. That in accordance with this agreement between plaintiff and defendants, plaintiff daily delivered to the plant at Sterling meat products in large amounts from June 15 to July 15, 1943 which were used by defendants for the product sold to the United States Government, and defendants shipped the product to the United States Government; that there was a balance of \$1,200 due for these meats sold by plaintiff to defendants and that July 15, 1943, this account was gone over by plaintiff and defendants and it was agreed by the parties that \$1,200 was due and unpaid for the products and that there was also due and owing to plaintiff from defendants \$7,000 for money loaned, making a total of \$8,200 for which plaintiff sued.

It is further alleged in the amended complaint that on June 10, 1943, and subsequent, there were secret written agreements entered into between Sterling Brands and the Finance Company whereby Sterling Brands transferred and conveyed all of its assets to the

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Finance Company together with accounts receivable due and owing to Sterling Brands from the United States Government in payment of the products furnished to the United States Government by defendants, as above stated. It is averred that these "Agreements were in violation of the rights of plaintiff and creditors and were a fraud instituted to hinder and delay plaintiff and creditors;" that the Finance Company "was in fact, the owner of the business and had charge of the books of account of the business conducted under the name of STERLING BRANDS, INC." And it attempted to foreclose a chattle mortgage which was given by Sterling Brands to the Finance Company at the time of the purported transfer by Sterling Brands to the Finance Company which was in fraud of the rights of plaintiff; that the Finance Company assumed control of Sterling Brands and took over all of the assets of Sterling Brands and that this was "a fraud on the creditors of the STERLING BRANDS, INC., and a fraud on" plaintiff who was a creditor and therefore plaintiff was entitled to recover from both defendants the \$8,200. It was further alleged that the Finance Company now has all the assets of Sterling Brands and has converted them to its own use; that plaintiff is informed and believes that the agreements between the defendants "consist of four separate agreements" and that this was not brought to the knowledge of plaintiff or the creditors of defendants until after the \$7,000 was loaned and the meats delivered by plaintiff, as above stated. That the "agreements are termed 'a joint venture', where in law and in fact, the aforesaid agreements are partnership agreements between the two defendants." That the agreements are unconscionable and should be cancelled and that the funds received of the General Finance under the four agreements should be delivered to defendants' creditors, including plaintiff.

It is further alleged that under the "alleged 'joint venture' agreements which were secretly drawn up by and between the defendants" the Finance Company took out certain charges and according

Finance Company together with its assets receivable and on a basis of Sterling Brand from the United States Government in payment of the products furnished to the United States by means of defendants, as above stated. It is averred that these "agreements" are in violation of the rights of plaintiff and constitute an infringement of the rights of plaintiff and delay plaintiff and defendant; that the Finance Company "was in fact, the owner of the business" and had charge of the books of account of the business conducted under the name of Sterling Brand, Inc. It is alleged that the Finance Company at the time of the purchase and transfer of the Sterling Brand to the Finance Company which was given by defendant to the Finance Company at the time of the purchase and transfer of the Sterling Brand to the Finance Company which was in fact of the Finance Company and took that the Finance Company used control of the Sterling Brand and took over all of the assets of Sterling Brand and the Sterling Brand found on the records of the Sterling Brand, Inc., and a finding on plaintiff who was a creditor and shareholder of plaintiff and entitled to recover from both defendants the \$2,500. It was further alleged that the Finance Company now has all the assets of Sterling Brand and has converted them to its own use; that defendant is indebted and believes that the agreements between the Finance Company and plaintiff are "separate agreements" and that this was not owing to the knowledge of plaintiff or the creditors of defendants until after the \$2,500 was loaned and the same delivered to plaintiff, as above stated. That the "agreements" are termed "joint venture" in law and in fact, the aforesaid agreements are partnership agreements between the two defendants. That the agreements are not ascertainable and should be cancelled and that the funds received of the Finance Company under the four agreements should be delivered to defendants' creditors, including plaintiff. It is further alleged that under the "alleged joint venture" agreements which were secretly drawn up by and between the defendants the Finance Company took out certain charges and according

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to a report drawn by the Finance Company, the defendant, Sterling Brands at no time made any money in the transaction but lost money and was insolvent; that this was shown by the audit made by the Finance Company on or about August 6, 1943; that on information and belief plaintiff alleges that under the "secret agreements" between the defendants during all the time Sterling Brands was functioning, the Finance Company had its employees in charge of the business and kept the books and controlled the execution and terms of any contract entered into between Sterling Brands and the United States. That it was stipulated in the secret agreements that the Finance Company would have complete control of the execution of any contract made by Sterling Brands but that the Finance Company would incur no liability unless there was a profit for the Finance Company; that all employees of Sterling Brands would be subject to the approval of the Finance Company as were all insurance policies and "all moneys being received under the 'joint venture', after deducting all the expenses" that the profits if any, were to be divided on a fifty-fifty basis between the two defendants; that notwithstanding the secret agreements the Finance Company received as its share of the profits about \$100,000.00 while Sterling Brands received nothing except moneys and goods delivered by plaintiff and other creditors and that it was at all times insolvent and unable to fill its contracts with the United States Government.

Count 3 adopts substantially all of Count 1 and adds that on July 12, 1943, "defendants being indebted to the plaintiff in the sum of EIGHTY-TWO HUNDRED DOLLARS (\$8,200.00) for money found to be due from the defendants to the plaintiff upon an account then and there stated between them, and being so indebted, the defendants, in consideration thereof, then and there promised the plaintiff to pay him the said sum of money on request; yet the defendants, though requested, have not paid the same, or any part thereof, to the plaintiff, but refuse to do so; to the damage of the plaintiff of EIGHTY-TWO HUNDRED DOLLARS (\$8,200.00), with interest at five (5%) percent

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as allowed by law."

Counsel for the Finance Company contend that the "complaint lacks necessary allegations of facts upon which a charge of fraud can be sustained" for the reason that under the law allegations of fraud must state the facts with great particularity. We think this contention must be sustained.

Counsel further contend that the complaint does not allege sufficient facts to create any liability of the Finance Company. While we are of opinion that the allegations of the complaint are in many respects not well drawn, yet we think that they allege in substance that plaintiff loaned \$7,000 to the Sterling Brands, sold and delivered meats to both defendants, for which there was a balance due of \$1,200 and further, that the business of Sterling Brands was in fact owned in part and controlled by the defendant Finance Company. In these circumstances we think the Finance Company would not only be liable for the \$1,200 but also for the \$7,000, of course if plaintiff proves the allegations. Moreover, we are of opinion that the allegations as to the account stated between the parties are sufficient.

The judgment of the Superior court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

Niemeyer, P. J., and Matchett, J., concur.

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Complaint for the license company, for a license to

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and the cause remanded.

Witness, J. J. and Attorney, J. J. and Attorney.

DAVID J. CARROLL,
Appellee,

v.
LEANDER J. McCORMICK BUILD-
ING CORPORATION, a Corporation,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

32-1-1-157

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the Leander J. McCormick Building Corporation and the McCormick Management Corporation to recover \$15,400 claimed to be due him for commissions in obtaining a tenant for property owned by defendants. Defendants denied liability, there was a jury trial, at the close of the case plaintiff dismissed the action as to the Management Corporation, there was a verdict and judgment for \$15,400 in plaintiff's favor against the Building Corporation and it appeals.

The record discloses that a number of pieces of real estate were said to be owned by the Leander J. McCormick estate but the names of the persons in whom the title stood do not appear. One of such properties was known as the Galbraith Building, located on the corner of West Madison and Franklin streets, the title to which was conveyed to the defendant Building Corporation. Other somewhat similar properties were also conveyed to the Building Corporation. The Leander J. McCormick estate, the Building Corporation and the Management Corporation were conducted in the McCormick Building on Michigan avenue with Charles J. Donnelly in charge. He was a director and treasurer of both corporations. Robert H. McCormick was president of both corporations. The Management Corporation did not hold title to any of the property. Donnelly was agent of the Galbraith Building which was being operated at a loss in 1939.

DAVID J. GARRELL,
Appellee,

v.

LEONARD J. MCCORMICK BUILD-
ING CORPORATION, a Corporation,
Appellant.

MR. JUSTICE GREGORY delivered the opinion.

Plaintiff brought an action against defendant.

McCormick Building Corporation and the defendant.

Corporation to recover \$15,400 claimed to be due for property.

alone in obtaining a tenant for property owned by defendant.

Defendants denied liability, there was a jury trial, and a close

of the case plaintiff dismissed the action as to the defendant.

Corporation, there was a verdict and judgment for \$15,400 in

plaintiff's favor against the Building Corporation and its agents.

The record discloses that a number of parcels of real estate

were said to be owned by the Leonard J. McCormick estate and the

names of the persons in whom the title stood do not appear. The

of such properties was known as the Delphic Building, located

on the corner of West Madison and Franklin streets, the title to

which was conveyed to the defendant Building Corporation. Other

somewhat similar properties were also conveyed to the Building

Corporation. The Leonard J. McCormick estate, the Building Corpora-

tion and the Management Corporation were conducted in the Management

Building on Michigan Avenue with Charles J. Donnelly in charge. He

was a director and treasurer of both corporations. Robert H.

McCormick was president of both corporations. The Management Cor-

poration did not hold title to any of the property. Donnelly was

agent of the Delphic Building which was being operated at a loss

in 1932.

The plaintiff, Mr. Carroll, testified that in 1939 he started a small mechanical manufacturing business, manufacturing soap powder and grease removers and was looking for a location. Mr. John R. Todd testified he was interested in the soap end of the business and space was given to plaintiff in the Galbraith Building, without rent, in the hope that he would be able to build up a business and become a good tenant. Afterward plaintiff was also given space in the Roanoke Building, owned by defendant corporation, without the payment of rent. It was suggested that he take out a real estate broker's license and obtain a tenant for the Galbraith Building. The license was obtained and plaintiff endeavored to secure a tenant for the building which was to be remodeled and rented for bowling alleys and other purposes. George D. Tesch, an architect, became interested in the project. He drew tentative plans for remodeling the building in the hope that he might be retained as the architect and be paid for his services in case the plan was carried out. The estimated cost of remodeling the building was about \$140,000.

The evidence is further to the effect that plaintiff did a great deal of work which extended over a considerable period of time in endeavoring to secure a tenant and on April 28, 1941, submitted the application of the J. A. E. corporation as tenant for the building when it should be modernized, to be used for a bowling alley, bar, restaurant, etc. The application was "For period of twenty years, beginning with completion of improvements. Building to be ready for occupancy early in 1945.

"At a monthly rental payable in advance of \$3208.33 based on annual rental of \$38,500m- privilege of sub-leasing." This application was signed by Joseph Amelianovich, President. May 12, Mr. Donnelly wrote plaintiff a letter in which it was stated that: "Mr. McCormick has decided that this is not the time to enter into a project of the nature as outlined in your letter" and that he was

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returning for plaintiff's files the application for the lease.

Mr. Amelianovich, called by plaintiff, testified that the J. A. A. Corporation was conducting a tavern at 501 South State street, Chicago, and that he conducted similar businesses at a number of other places, the addresses of which he gave; that the only place operated by the J. A. A. Corporation was at 501 South State street, Chicago; that he signed the application for the lease; that he and his son were the officers of the J. A. A. Corporation which is "still in existence;" that his son owned all of the stock of that company. That on April 28, 1941, the date the application was signed, the J. A. A. Corporation was ready, willing and able to perform the provisions of the lease which should be executed in accordance with the application made that day - at an annual rental of \$38,500 for a period of twenty years; that the J. A. A. Corporation had a capitalization of \$1,000. "It was a closed corporation." On cross-examination he testified that on the date of the application the corporation had in the bank about \$3,000 and did not have any other property, real or personal.

There is other evidence in the record but we think the above presents substantially a true picture of the case as disclosed by the evidence.

Defendant contends that the court erred in refusing to instruct the jury to return a verdict in its favor for the reason that there was no agreement between plaintiff and defendant Building Corporation; that all the dealings with reference to obtaining a tenant for the Galbraith Building was between him and the Leander J. McCormick estate. We think this contention cannot be sustained. The title to the building was in the defendant, Building Corporation. Its business as also the business of the Management Corporation and the Leander J. McCormick estate was in direct charge of Mr. Donnelly and its business conducted in the same office. Negotiations for the remodeling and leasing of the

returning for a similar office in Chicago for the purpose of
Mr. McDanielson, called by exhibit, testified that the
J. A. McDanielson was conducting a business at 100 West
Street, Chicago, and that he conducted a business at a
number of other places, the addresses of which he did not
only place operated by him, but also at other places.
State Street, Chicago; that he claimed to be a resident of
Illinois; that he and his son were the owners of the
Corporation which is in evidence; that he was the owner
of the stock of that company.
The application was made, and the application was made
willing and able to perform the duties of the office
which he was appointed to perform in the office of the
day - at an annual salary of \$5,000 per annum, and that
that the J. A. McDanielson was a resident of Chicago, and
was a closed corporation. In the application of the
on the date of the application of the corporation, the
about \$5,000 and did not have any other property.
There is other evidence in the record which tends to
present substantially a true picture of the business of the
the evidence.

Defendant contends that the corporation is a corporation
instructed the jury to return a verdict in the affirmative
that there was no agreement between Plaintiff and Defendant
Building Corporation; that all the dealings with reference to
obtaining a tenant for the building building was between the
the Defendant L. McDanielson and the Plaintiff Corporation, and
be sustained. The title to the building was in the Defendant,
Building Corporation. The business was also the business of the
Management Corporation and the Defendant L. McDanielson, and
in direct charge of Mr. Donnelly and the business conducted in the
same office. Defendant also contends that the corporation and Plaintiff of the

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building covered a period from the latter part of 1939 until April 30, 1941. The evidence shows that at one time plaintiff, Mr. McCormick and Mr. Donnelly went to New York with a view to securing a tenant for the property. In view of all the evidence in the record we are of opinion that defendant is estopped now to deny that it had no connection with plaintiff. Acorn Lumber Co. v. Friedlander Box Co., 240 Ill. App. 425 and cases there cited; Chicago Smelting & Refining Corp. v. Sullivan, 246 Ill. App. 538; Greengard v. Katz, 270 Ill. App. 227.

It is conceded by counsel for both parties that for plaintiff to recover he must prove by a preponderance of the evidence that the J. A. A. Corporation, the tenant tendered by him, was ready, willing and financially able to rent the property on the proposed terms. Counsel for defendant contend that the verdict finding in effect that J. A. A. Corporation was financially able is against the manifest weight of the evidence. We think this contention must be sustained. The uncontradicted evidence is to the effect that defendant would be required to expend about \$140,000 to remodel the building and the only property the proposed tenant had was \$3,000 in the bank and the capital stock of \$1,000. We think it obvious that the owner of property proposing to make such a lease would not expend \$140,000 and execute a lease to a tenant with such small assets where the rent was \$38,500 a year. We are further of opinion that the evidence is to the effect that the proposition made by Mr. Donnelly to Mr. Carroll was but a preliminary proposition, the details of which would have to be worked out when a lease was to be prepared and signed.

The judgment of the Superior court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, J., concurs.

Niemeyer, P. J., specially concurring. over.

building covered a portion of the building and the building was
April 30, 1941. The evidence shows that the building was
Mr. McGowan and Mr. McGowan's son, Mr. McGowan, Jr., were
acquiring a building on the corner of the building and the building
in the records of the building and the building was
to form that it had no connection with the building and the building
briefly after the building was built and the building was
Chicago Building & Construction Co., Inc., was the building
President of the building, Mr. McGowan, Jr., was the building
It is apparent that the building was built and the building was
still to recover the building and the building was
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proposed terms. The building was built and the building was
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as \$5,000 in the building and the building was
it appears that the building was built and the building was
would not exceed \$5,000 and the building was
small amount spent the building was built and the building was
of opinion that the evidence is to the effect that the building was
made by Mr. McGowan to the building and the building was
flow, the details of which would have to be worked out and a lease
was to be prepared and signed.

The judgment of the Superior Court of Cook County is affirmed
and the cause remanded.
REVEREND J. J. McGUIRE
March 21, 1942

5.

I do not concur in the holding that the Leander J. McCormick Building Corporation is liable on the contract of the Estate of Leander J. McCormick. The record shows, without conflict in the evidence, that for income tax purposes various properties, including the Galbraith building involved in this action, held by the heirs and devisees of Leander J. McCormick as tenants in common, were conveyed to the building corporation, which was merely a holding company. The management of the respective buildings, including renting and making of leases, etc., was under the control and direction of the tenants in common, operating under the name of the Estate of Leander J. McCormick. Neither the names of the tenants in common nor the stockholders of the holding company are shown. Donnelly, the agent of the estate, handled the details of management and passed on leases, except the larger ones, which were submitted to the committee of the tenants in common. He was also treasurer of the corporation. One of the tenants in common was president. All correspondence from the plaintiff, including the proposal to lease submitted by him, was addressed to the estate, and the reply from Donnelly was in the name of the estate. No charge of fraud is made and there is not the slightest evidence of any deception or trickery in the transaction before us or in the conduct of the business of the corporation or estate or any individual connected with them. In fact, plaintiff in his brief says "The form of the correspondence used by Donnelly and the name used on the door of the office invited the plaintiff to conduct the dealings in the name of the estate..." There is neither charge nor evidence of the insolvency of the persons doing business under the name of the estate. No reason appears why an action cannot be brought against these persons on contracts made in the name of the estate, or why a judgment, if obtained, cannot be as readily collected as one against

I do not consent in the building of the house - of course
Building Corporation is liable on the ground of the nature of
Alexander J. Kellorick. The house was built on the lot of
evidence, that for income tax purposes it was a house, and in the
the building built by the corporation, and the corporation is
and the house of the corporation, and the corporation is
conveyed to the building corporation, and the corporation is
company. The corporation is a corporation, and the corporation is
residing in the house of the corporation, and the corporation is
direction of the house of the corporation, and the corporation is
estate of Alexander J. Kellorick, and the corporation is
in order for the house of the corporation, and the corporation is
Donally, the house of the corporation, and the corporation is
and owned on the house of the corporation, and the corporation is
to the corporation of the house of the corporation, and the corporation is
of the corporation, and the corporation is
All correspondence from the corporation, and the corporation is
house owned by the corporation, and the corporation is
from Donally is in the house of the corporation, and the corporation is
is made and there is no other house of the corporation, and the corporation is
or liability in the corporation, and the corporation is
business of the corporation on the house of the corporation, and the corporation is
with them. In fact, the house of the corporation, and the corporation is
correspondence used by the corporation, and the corporation is
the office invited the corporation to the house of the corporation, and the corporation is
name of the estate... There is no other house of the corporation, and the corporation is
agency of the persons doing business with the house of the corporation, and the corporation is
No reason appears why an action should be brought against the house of the corporation, and the corporation is
persons on contracts made in the name of the house of the corporation, and the corporation is
judgment, if obtained, cannot be as readily collected as the estate.

6.

the corporation. Apparently plaintiff is under the belief that he can only recover from the title holder. It is only in cases of fraud that the distinct corporate entity will be disregarded (Dregne v. Five Cent Cab Co., 381 Ill. 594, 605; Superior Coal Co. v. Department of Finance, 377 Ill. 282), or a contract of a stockholder treated as a contract of the corporation. Wollenberger v. Hoover, 346 Ill. 511.

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45187 Consolidated
45188

H. BURTON BURTON,
Attorney,

ALL-LOAN NATIONAL BANK AND
TRUST CO., OF NEW YORK,
Corporation, of 21,
As filer,

Mr. BURTON BURTON, of New York,

Plaintiff, vs. The All-Loan National Bank and Trust Company,

in one affidavit sworn to and filed in the County of New York,

State of New York, to wit: That the said Plaintiff is a corporation organized under the laws of the State of New York,

Trust No. 1, 1911, and is the owner of the said property,

units of beneficial interest in the said property, and is entitled to the same,

Trust No. 2, 1911, and is the owner of the said property,

and retained the same, and is entitled to the same,

of the property referred to in the said affidavit, and is entitled to the same,

Bank & Trust Company, Trust, and is the owner of the said property,

defendants and on 21, 1911, and is the owner of the said property,

issues raised by the complaint, and is entitled to the same,

of the liquidated trust amount of \$100,000.00 - in full,

and found that the same was not paid to the said Plaintiff,

in his complaint and was retained by the said Bank & Trust Company,

found for the defendants. The court further found that the

posed disposition of the trust property which was sought to be

enjoined, was authorized by the terms of the trust agreement,

dismissed the writ of prohibition, and is entitled to the same,

by stipulation of the parties the two causes are consolidated,

dated in this court and submitted on one set of exhibits and

briefs,

The record disclosed that the defendant defendant

2.

tute the property involved, one known as 706-12 Seward Street, Chicago, Illinois, and the other known as 707-13 Seward Street, Evanston, Illinois. Each building consists of 18 four-room apartments and 6 five-room apartments all of which are unfurnished. Each building is a three-story and English basement, approximately 18 years old. September 30, 1930, bonds which were secured by trust deeds on the property were deposited with a Bondholders' Committee pursuant to an agreement. April 15, 1935, a trust agreement, the construction of which is involved, was entered into by "Avery Brundage, Horatio B. Hackett, Francis R. Blossom, J. L. Kraft and Charles M. Moderwell, constituting the Protective Committee for the Holders of Bonds sold by or through Stone Securities Co." parties of the first part, defendant, the American National Bank & Trust Co., of Chicago, called the "Trustee" party of the second part, and Avery Brundage, Charles M. Moderwell and Francis R. Blossom, called "Trust Managers" parties of the third part.

It is alleged in the complaint that the defendants, Leonard J. McGee, Eugene J. Jacques and Earle E. Ewins are the trust managers of the two properties and that on January 28, 1944, they mailed a notice to the owners of the beneficial certificates, including plaintiff, informing them that the trusts would, by their terms, expire April 15, 1945, and that the property must be sold or reorganized prior to that date; that they had theretofore organized two corporations and directed the bank, as trustee, to transfer the two pieces of real estate to the newly organized corporations in exchange for 1,500 shares of stock of each corporation. The notice further advised the holders of the beneficial certificates that the two newly organized corporations had made offers to purchase the two apartment buildings in exchange for 1,500 shares of the common stock in each of such corporations, being all of the common stock. That the purchaser agreed to assume and pay the balance due on the existing mortgage, all taxes, other bills, etc.; that the trustee

the property involved, one known as 701-12, located at
Chicago, Illinois, and the other known as 701-13, located at
Evanston, Illinois. Each building consists of four stories
and 6 five-room apartments all of which are rented.
Each building is a three-story and a half building, built in
18 years old. September 20, 1930, both buildings were sold by
trust deeds on the property were deposited with a mortgagee,
lites pursuant to an agreement. The agreement provided that
the construction of which is involved, the agreement provided
Brundage, Horatio H. "Hackett", Francis J. Hackett, and
Charles M. Mohrwell, constituting the "Trust Managers" of the
Holders of Bonds sold by or through "Trust Managers",
of the first party, defendant, the second party, and the third
of Chicago, called the "Trust Managers" of the first party,
Brundage, Charles M. Mohrwell and Francis J. Hackett, and
"Trust Managers" parties of the third party.
It is alleged in the complaint that the defendant, second
J. McGee, Eugene J. Jacques and Ralph J. McGee and the third
managers of the two properties and that on January 1, 1931, they
mailed a notice to the owners of the benefited properties,
including plaintiff, informing them that the trust would, in their
terms, expire April 15, 1945, and that the property was to be sold or
reorganized prior to that date; that they had therefore organized
two corporations and directed the party, as trustee, to transfer the
two pieces of real estate to the newly organized corporations and in
exchange for 1,500 shares of stock of each corporation. The notice
further advised the holders of the beneficial certificates that the
two newly organized corporations had made offers to purchase the
two apartment buildings in exchange for 1,500 shares of the common
stock in each of such corporations, being all of the common stock.
That the purchaser agreed to assume and pay the balance due on the
existing mortgage, all taxes, other bills, etc.; that the trustee

3.

was advised that the trust managers had theretofore sent a letter to the holders of beneficial certificates requesting their expression as to whether they wished the property sold for the best price obtainable, as reorganized, and that the trustee was advised by far the larger part replying that they wished the property reorganized. That if the sale is consummated, the 1,500 shares of stock (the entire capitalization) would be distributed pro rata among the certificate holders; that a copy of the by-laws of the corporation was on file with the trustee and the directors would hold offices in the newly formed corporation for three months from January 27, 1944, at which time a meeting of the shareholders would be held and directors elected for the ensuing year; that the trust managers directed it, the trustee, to give the notice of the offer and in the event that less than one-third of the certificate holders objected, the property would be conveyed to the corporations; that the agreement creating the trust provided that the trustee should not sell or otherwise dispose of the bulk of the property unless it should give 20 days' prior notice by mail, to the holders of the beneficial certificates, and that no sale would be made within 20 days from the mailing of such notice. That the certificate holders who approved the proposed sale or exchange need take no action to signify their approval; that those who disapproved of the sale or exchange should file their objections within 20 days with the trustee bank.

The defendant bank, as trustee, and the defendant managers, filed separate answers. In the managers' answers it was admitted that plaintiff was the legal owner and holder of the 20 units in the one case and 40 in the other, having acquired the 20 units January 7, 1944, and the 40 units being acquired - 20 January 7, and 20 February 4, 1944. That both of the corporations were organized December 7, 1943, with the knowledge of the beneficial certificate

was advised that the trust managers had therefore sent a letter to the holders of beneficial certificates requesting their expression as to whether they wished the property sold for the best price obtainable, as proposed, and that the trustee was advised by far the larger part replying that they wished the property reorganized. That if the sale is consummated, the 1,500 shares of stock (the entire capitalization) would be distributed pro rata among the certificate holders; that a copy of the by-laws of the corporation was on file with the trustee and the directors would hold office in the newly formed corporation for three months from January 27, 1944, at which time a meeting of the shareholders would be held and directors elected for the ensuing year; that the trust managers directed it, the trustee, to give the notice of the offer and in the event that less than one-third of the certificate holders objected, the property would be conveyed to the corporation; that the agreement creating the trust provided that the trustee should not sell or otherwise dispose of the bulk of the property unless it should give 30 days' prior notice by mail, to the holders of the beneficial certificates, and that no sale would be made within 30 days from the mailing of such notice. That the certificate holders who approved the proposed sale or exchange need take no action to signify their approval; that those who disapproved of the sale or exchange should file their objections within 30 days with the trustee bank.

The defendant bank, as trustee, and the defendant managers, filed separate answers. In the managers' answers it was admitted that plaintiff was the legal owner and holder of the 30 units in the one case and 40 in the other, having acquired the 30 units January 7, 1944, and the 40 units being acquired - 20 January 7 and 20 February 4, 1944. That both of the corporations were organized December 7, 1943, with the knowledge of the beneficial certificate

4.

owners, a small percentage of whom objected.

The trust agreement is attached as an exhibit to the answer of the managers, who are given broad powers and they point for authority to make the transfer of the two buildings as proposed, to the following: "The Trustee shall have full power *** to grant options to purchase, to contract to sell and to sell the trust property *** on any terms, including a sale of the trust property *** to another trust or to a corporation now or hereafter organized in exchange for stocks, bonds or other securities of such corporation or trust."

The record further discloses that 90 units (which include plaintiff's 40) out of a total of 1,500 units have objected to the proposed sale or exchange of the property, and under the terms of the trust agreement, unless one-third objects, the transfer may be made.

Counsel for both parties agree that any authority to convey the two properties must be found in the trust agreement, and, as stated counsel for defendants rely on the provision above quoted. On the other side, counsel for plaintiff say that the trust agreement authorizes the sale of the properties, while the proposed transaction is not a sale, but in fact, a reorganization, and a number of authorities are cited, but we think it would serve no useful purpose to discuss these authorities for it will be found that the facts in each of these cases differ from the facts involved in the case before us. So that we must construe the provisions of the trust agreements. They give the trustee full power "to sell the trust property *** to another trust or to a corporation now or hereafter organized in exchange for stocks, bonds or other securities of such corporation or ^a trust." We think it clear that this provision means that the trustee may sell the two apartment buildings to a corporation ~~that~~ in existence or one thereafter - organized "in exchange for stocks, *** of such corporation." And while the

owners, a small percentage of them objected. The trust agreement is attached as an exhibit to the answer of the managers, who are given broad powers and they want for authority to make the transfer of the two buildings as proposed, to the following: "The trustees shall have full power and authority to purchase, to contract to sell, and to sell the trust property on any terms, including a sale of the trust property to another trust or to a corporation now or hereafter organized in exchange for stock, bonds or other securities of such corporation or trust."

The record further discloses that on March 1, 1924, the plaintiff's 40) out of a total of 1,500 shares were sold to the proposed sale or exchange of the property, and upon the terms of the trust agreement, unless and until the trustees may be made.

Counsel for both parties agree that the only way to carry out the two properties must be found in the trust agreement, and as stated, counsel for defendant rely on the provision above quoted. On the other side, counsel for plaintiff say that the trust agreement authorizes the sale of the properties, and the proposed transfer is not a sale, but in fact, a reorganization, and a number of authorities are cited, but we think it would serve no useful purpose to discuss these authorities for it will be found that the facts in each of these cases differ from the facts involved in the case before us. So that we must examine the provisions of the trust agreements. They give the trustees full power to sell the trust property to another trust or to a corporation now or hereafter organized in exchange for stock, bonds or other securities of such corporation or trust. We think it clear that this provision means that the trustees may sell the two apartment buildings to a corporation then in existence or one thereafter organized.

5.

carrying out of the deal may not be a sale within the technical definition of that term, yet we are of opinion that the word "sale" as used in the trust agreement is broader and authorizes the trustee to sell and convey the apartment buildings and take in payment thereof, stock in the new corporations.

The decrees of the Circuit court of Cook county are affirmed.

DECREES AFFIRMED.

Niemeyer, P. J., concurs.

Matchett, J., dissents.

carrying out of the deal may not be a sale within the technical
definition of that term, yet so one of opinion that the word
"sale" as used in the trust agreement is broader and includes
the trustee to sell and convey the specified property or take in
payment thereof, stock in the new corporation.
The decree of the Circuit Court of Cook County, Ill., is
affirmed.

WILLIAM J. BURNETT,

Wienberger, F. J., counsel.
Metcalf, J. J., associate.

43041

CHARLIE W. RIEMAN,

Plaintiff - Appellee,

v.

A. G. RIEMAN,

Defendant - Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. PRESIDING JUSTICE BURKE DELIVERED THE DECISION OF THE COURT.

On May 5, 1936 a decree was entered in the Superior Court of Cook County dissolving the bonds of matrimony between Charlie Watts Rieman, plaintiff, and Adolph G. Rieman, defendant, awarding the custody of their child, Robert Donald Rieman, to the plaintiff, reserving to defendant the right of visiting with his son, and ordering him to pay \$7.00 a week for the support and maintenance of plaintiff and their child. The order for alimony was based on a finding that the defendant was skilled in the printing trade; that his wages were at the rate of 1.10 an hour, and that his total income during the previous year was approximately \$900.00, or at the rate of \$17.00 a week. Robert Donald Rieman is now 14 years of age. On December 30, 1937 an order was entered permitting defendant to have the child at certain times. On March 4, 1938 a stipulation was filed, wherein the parties agreed that the defendant was fully paid up to and including March 3, 1938; that he claimed other credits; that the court be requested to find as to how much of the \$7.00 per week he was required to pay was for support for the child and how much was for alimony; and that the court determine whether or not defendant should continue payment of such alimony, or whether it should be reduced or eliminated. The stipulation further stated that plaintiff refused to permit defendant to see the child, under the impression that the defendant was behind in his payments. An order was entered March 15, 1938, nunc pro tunc

CHARLES E. HILMAN,

Plaintiff - Respondent,

v.

A. G. HILMAN,

Defendant - Respondent.

23

MR. HILMAN'S EXHIBIT NO. 1.

On May 1, 1938, I, Charles E. Hilman,

County of Cook, State of Illinois, do hereby certify that

Charles E. Hilman, Plaintiff, and A. G. Hilman, Defendant,

appeared before me on May 1, 1938, at my office in Cook County, Illinois,

the Plaintiff, requesting to have the child in dispute

his son, and requesting me to act as referee in the

maintenance of said child and wife's child, and to have the

case heard on a finding of fact and law in the

pending case; that the said child is now in the

custody of his father, and that the said child is

1900.00, or at the rate of \$7.00 per week, until

is now in custody of the said child, and that the

pending defendant to have the child in custody, in

March 1, 1938, a stipulation was filed, whereby the parties agreed

that the defendant was to pay to the plaintiff the sum of \$1,000.00;

that he claimed other credits; that the court so ordered to find

as to how much of the \$7.00 per week he was entitled to pay for

support for the child and how much for alimony; and that the

court determine whether or not defendant should continue payment

of such alimony, or whether it should be reduced or eliminated. The

stipulation further stated that plaintiff refused to permit defendant

to see the child, under the stipulation that the defendant was to

in his testament. An order was entered March 15, 1938, upon the

as of March 4, 1938, that the defendant had paid all monies required of him to and including March 3, 1938; that the prayer of the defendant for the allowance of credit for overpayment of \$3.00 a week for a period of 41 weeks be allowed; and that \$7.00 a week be paid by the defendant for the support of the child only and that nothing be paid for alimony. On February 14, 1941 plaintiff filed her petition alleging that she was a registered nurse; that their son, then 10 years of age, required more constant supervision and guidance than formerly; that to earn her living she was required to be away from home about 4 hours every evening during the period when the boy was at home awake and unattended; that the defendant was contributing with "some regularity" the sum of \$7.00 per week for the support of the boy, but that "even this sum taxes the ability of the father to pay"; and prayed that she be permitted to place the child in a boarding school. The court directed that the petition be heard on March 14, 1941. On that day plaintiff filed another petition alleging that defendant had wilfully failed to comply with the order that he pay \$7.00 a week; that he was in arrears \$162.00; that the child was then 3 years older than at the time the order was entered; that she was entitled to an increase in the allowance, and she asked that a rule be entered requiring him to show cause why he should not be punished for contempt of court. On March 14, 1941 the court found that there had been a change of circumstances since the entry of the original decree, and ordered defendant to pay \$12.00 per week until the further order of the court. The court also entered a rule that defendant show cause why he should not be punished for contempt for failing to obey the previous order. The court based the order increasing the allowance on the testimony of a representative of the Manz Engraving Corporation,

of March 4, 1933, that the defendant had not been removed
of his to and including March 3, 1933; that two copies of the
defendant for the purpose of making the same known to the
week for a period of 41 weeks in all; that the
paid by the defendant for the purpose of making the same known to the
nothing be said for himself. On February 12, 1933, the defendant
her petition alleging that she was a mother of a child; that in
con then in 1933, the defendant was removed from the home of the
evidence than before; that the defendant was removed from the home
to be away from home about 1 hour every day; that the defendant
when the boy was 12 years old, the defendant was removed from the home
was controlling with some responsibility; that the defendant was
for the support of the boy, but the defendant was not able to
ability of the father to pay; that the defendant was not able to
to place the child in a home; that the defendant was not able to
the petition he heard in March 14, 1933. On March 14, 1933,
filed another petition alleging that the defendant was not able to
to comply with the order that the defendant was not able to
execute \$100.00; that the defendant was not able to execute the
time the order was entered; that the defendant was not able to
in the affidavit, but the defendant was not able to execute the
his to show cause why he should not be removed from the custody of
court. On March 14, 1933, the court found that there was a
change of circumstances since the entry of the original decree, and
ordered defendant to pay \$12.00 per week until the further order of
the court. The court also entered a writ of habeas corpus inasmuch
why he should not be removed from the custody of the father to stay the
previous order. The court based the order upon the fact that the
on the testimony of a representative of the Home Protective Association,

the employer of defendant. On March 27, 1941 the defendant filed his answer, setting forth what moneys and credits plaintiff had failed to give credit for, including the allowance of \$123.00 in the order of March 15, 1938. At the same time he filed a petition stating that the best interests of the child required that the child's custody be awarded to him; that in the hearing as to the increase of the allowance he was not permitted to testify; that the order of March 14, 1941 was null and void, and he prayed that the custody of the child be awarded to him; that he be excused from paying any further moneys to the plaintiff and that the order of March 14, 1941, directing him to pay \$12.00 a week, be vacated. The court referred the matter of receipts only to Charles C. Cooley, a special commissioner, who reported that there was due from defendant on March 14, 1941 the sum of \$145.00. Exceptions were filed to the effect that the figures were erroneous and that the special commissioner failed to give credit for the allowance made in the order of March 15, 1938. On June 9, 1942 defendant filed his petition alleging that the hearing on his petition of March 14, 1941 had been continued many times and he requested a hearing at once. About October 1, 1941 plaintiff notified defendant that she was leaving town for several weeks and would leave the child with him. Defendant had the boy for six weeks, during which time he occasionally took him to see plaintiff. During this period the father, mother and boy also went out and had meals together. About May 1, 1942 plaintiff took the boy back. On August 18, 1942 an order was entered permitting defendant to take the boy on a vacation. Plaintiff refused to permit him to go, claiming he was sick. On December 11, 1942 an order was entered that all pending motions in the case be referred to Special Commissioner Irving Abrams for hearing and report.

Commissioner Abrams' report was filed on October 26, 1943. He stated that pursuant to the order of reference he took the testimony of the witnesses and that before each witness testified he administered an oath. There were 8 hearings before Commissioner Abrams and the parties were given opportunity to introduce evidence on all matters in dispute. From the pleadings and evidence submitted, the commissioner found that from January 17, 1940 to December 3, 1940 defendant earned, while employed as a printer for the Manz Corporation, the sum of \$1,243.45, less \$12.43 social security tax, or a net sum of \$1,231.02; that he paid \$183.00 for union dues, leaving net earnings from the Manz Corporation of \$1,048.00; that in addition defendant earned as an automobile salesman from January, 1940 to December 30, 1940 the sum of \$1,428.52, less \$14.28 social security tax, or the net sum of \$1,414.24; that he paid \$23.50 for license fees and \$24.00 for union dues, leaving net earnings from the automobile sales company of \$1,366.74; that his total earnings for 1940 were \$2,414.76, or an average of \$46.43 per week, and that he earned from January 1, 1941 to March 14, 1941, the day when the petition for the increase of child support was entered, the sum of \$56.47 per week; that from January 1, 1943 to May 8, 1943 his average earnings were \$66.86 per week; that on March 14, 1941 the increased earnings of defendant warranted the increase; that at the time of the report defendant was financially able to comply with the order that he pay \$12.00 a week for the support of his son; that since the entry of the order of March 14, 1941 defendant paid only at the rate of \$7.00 per week; that from March 14, 1941 to June 3, 1943, the date of closing proofs, the defendant was in arrears \$5.00 a week, or the sum of \$450.00; that in addition defendant was in arrears the sum of \$145.00 up to March 14, 1941, as found in the report by Special Commissioner Cooley; that the total arrearage for child support as of June 3, 1943 was \$595.00; that plaintiff was a fit person to have the custody of the boy and that the boy was sick in August, 1942, at the time defendant wished to take him on a camping trip. Commissioner Abrams recommended

Commissioner Brown, County of Los Angeles, 1941.

He stated that pursuant to the order of the Commission

testimony of the witnesses and the Commission

he administered an order. The order was

affirmed and the order was

on all matters in dispute. The order was

the Commission found that the order was

testamentary order, which was

the sum of \$1,250.00, plus

of \$1,250.00; that the sum of

from the sum of \$1,250.00, plus

ordered an order of \$1,250.00, plus

1940 the sum of \$1,250.00, plus

not out of \$1,250.00, plus

for which sum, having not

of \$1,250.00; that the sum of

average of \$1,250.00, plus

to March 14, 1941, the sum of

which sum was ordered, the sum of

January 1, 1941 to March 14, 1941, the sum of

week; that on March 14, 1941, the sum of

passed the income; that the sum of

financially able to pay the sum of

for the support of his son; that the sum of

March 14, 1941 defendant will pay to the sum of

that from March 14, 1941 to March 14, 1942, the sum of

the defendant was in arrears \$1,250.00, plus

that in addition defendant was in arrears the sum of

March 14, 1941, as found in the report of Special Agent

that the total arrears for child support as of March 14, 1941 was

\$500.00; that plaintiff was a fit person to have the custody of the

boy and that the boy was sick in August, 1941, as the time defendant

wished to take him on a camping trip. Commissioner Brown recommended

that defendant's motion to vacate the order be denied; that an order be entered directing defendant to pay the sum of \$595.00, representing the arrearage for child support as of June 3, 1943; that defendant's petition that he be given custody of the boy be denied; that a certain change be made in the time when defendant might visit with his son; and that defendant's petition to show cause why she should not be punished for contempt of court for failure to deliver the boy to defendant for a vacation, be denied. On October 28, 1943 the court entered an order in accordance with the recommendations of Special Commissioner Abrams. The notice of appeal was filed December 1, 1943. On January 10, 1944 plaintiff filed a petition praying that defendant be held in contempt of court for failure to comply with the order requiring him to pay \$595.00; that a rule be entered requiring him to show cause why he should not be punished for contempt of court for failure to pay the sum of \$595.00, found by the court to be due as of June 3, 1943, and the further sum of \$238.00 which accrued since June 3, 1943; and that she be allowed reasonable attorney's fees. Defendant answered this petition. On January 10, 1944 the court ordered defendant to pay plaintiff as and for her attorney's fees the additional sum of \$100.00, and also directed that on failure of defendant to file a supersedeas bond in the sum of \$2,000.00 within 15 days, defendant be committed to the County Jail. On January 28, 1944 defendant filed a "notice of additional appeal" from the order of "January 9, 1944".

The first point urged by defendant is that he did not receive a fair trial "at any time", and that the orders directing him to pay are null and void. He complains of the order of March 14, 1941 increasing the allowance for the support of his son from \$7.00 to \$12.00 a week. He states he was not allowed to testify in his own behalf. The defendant did not seek, nor did the court certify a report of the proceedings before him on March 14, 1941. The order recites that the defendant was present personally and by his attorney, and that upon the sworn testimony of a representative of the Manz

Corporation that since January 8, 1941 the defendant had been receiving a salary of \$57.50 a week. On that testimony the court found that there was a change in the circumstances of the parties since the entry of the order requiring defendant to pay \$7.00 a week for the support of the child. In his petition to vacate the order, defendant states that he was "refused permission by the court to testify fully and completely". The record does not show any offer by the defendant as to what his testimony would be. During the hearings before Special Commissioner Abrams he was given full opportunity to present testimony as to income and resources. In our opinion, defendant received a fair trial and the orders entered were valid.

Defendant maintains that that part of the order of October 28, 1943, approving the report of Special Commissioner Cooley and ordering defendant to pay the sum of \$145.00, is invalid. The reference to Commissioner Cooley was made in the order entered May 28, 1941. Defendant did not object to the entry of this order. The report of Commissioner Cooley shows that defendant's attorney appeared before him and that the matter was fully heard by him. The defendant filed objections to the report. He stated that these objections were never heard. The record shows that on October 28, 1943 the court entered the following order:

"It is ordered that the report of Charles C. Cooley, Special Commissioner, filed on September 13, 1941, be and the same is hereby approved and that the objections of the defendant, Adolph G. Rieman, to said report of said Charles C. Cooley, Special Commissioner, be and the same are hereby overruled. The Court doth further find that pursuant to said report of Charles C. Cooley, Special Commissioner, the said Adolph G. Rieman was in arrears \$145.00 for child's support as of March 14, 1941."

Defendant also argues that the report of Commissioner Cooley should be ignored as he did not take an oath of office. Defendant did not object to the appointment of Commissioner Cooley, and he participated in all the proceedings before that commissioner, and did not raise

corporation that since January 8, 1941 the defendant had been receiving a salary of \$87.50 a week. On that testimony the court found that there was a chance in the circumstances of the parties since the entry of the order requiring defendant to pay \$25 a week for the support of the child. In his opinion he was not a worker, defendant stated that he was not a worker and that he was not to testify fully and completely. The court found that any other by the defendant as to what his business would be. During the hearings before Social Commissioner Goolley he was given full opportunity to present testimony as to income and expenses. In our opinion, defendant received a fair trial and the facts entered were valid.

Defendant maintains that that part of the order of October 26, 1941, requiring the return of Social Commissioner Goolley and ordering defendant to pay the sum of \$145.00 a week, is null and void because Commissioner Goolley was not in the court when the order was entered. Defendant did not object to the entry of this order. The report of Commissioner Goolley shows that defendant's income was reported before him and that the matter was fully heard by him. The defendant filed objections to the report. He stated that these objections were never heard. The record shows that on October 26, 1941 the court entered the following order:

"It is ordered that the report of Charles A. Goolley, Special Commissioner, filed on September 27, 1941, be and the same is hereby approved and that the objections of the defendant, Ralph G. Niman, be said report of said Charles A. Goolley, Special Commissioner, be and the same are hereby approved. The court doth further find that pursuant to said report of Charles A. Goolley, Special Commissioner, the said Ralph G. Niman was in arrears \$145.00 for child's support as of March 14, 1941."

Defendant also argues that the report of Commissioner Goolley should be ignored as he did not take an oath of office. Defendant did not object to the appointment of Commissioner Goolley, and he participated in all the proceedings before that commissioner, and did not raise

any objection to the qualifications of the commissioner until after the report had been made. The omission to take and file an oath was waived by the defendant.

Defendant complains of the order that he pay special Commissioner Abrams \$250.00. This is based on 42½ hours' time. Sec. 16, ch. 40, (Ill. Rev. Stats. 1943), (Sec. 15 of the Divorce Act) provides that the court may allow the master or commissioner a fee of not to exceed \$10.00 per day for each day necessarily consumed in "conducting and reporting the results of said investigation". Five hours is considered a day's work. *that* We agree with defendant under the statute the court should have allowed Commissioner Abrams \$4.50, and the decree should be modified accordingly.

Defendant urges that the order of October 28, 1943, requiring him to pay \$525.00 is erroneous. He states that the court did not read or consider the report or the exceptions to the report. The record does not bear out this statement. The order entered October 28, 1943 recites:

"On motion of attorney for plaintiff for an order sustaining the Special Commissioner's report of Irving A. Abrams, Special Commissioner of the Superior Court of Cook County, to whom said cause was, by order of court, heretofore referred to with directions to take proof and report of same and the defendant, Adolph G. Rieman, having filed exceptions to the report of the Special Commissioner and the hearing upon the said report and the exceptions thereto having been set for this date, and the court having before it the Special Commissioner's report of Irving I. Abrams, and the exceptions thereto and the defendant appearing in open court and moving to have said case continued and heard upon written arguments only and the court being fully advised in the premises and having jurisdiction of the parties and the subject matter, it is hereby ordered that the motion of the defendant to have said case continued, be and the same is hereby denied. It is further ordered that the exceptions of the defendant, Adolph G. Rieman, heretofore filed pursuant to the order of this court to the report of the Special Commissioner, Irving I. Abrams, be and the same are hereby overruled. It is further ordered that the report of the Special Commissioner, Irving I. Abrams, be and the same is hereby sustained."

The order from which defendant appeals shows on its face that the

Estimate your own total score and compare it with the suggested scores.

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11. Source: Vietnam 1954 1955 1956 1957 1958 1959 1960 1961 1962 1963 1964 1965 1966 1967 1968 1969 1970 1971 1972 1973 1974 1975 1976 1977 1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988 1989 1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028 2029 2030 2031 2032 2033 2034 2035 2036 2037 2038 2039 2040 2041 2042 2043 2044 2045 2046 2047 2048 2049 2050 2051 2052 2053 2054 2055 2056 2057 2058 2059 2060 2061 2062 2063 2064 2065 2066 2067 2068 2069 2070 2071 2072 2073 2074 2075 2076 2077 2078 2079 2080 2081 2082 2083 2084 2085 2086 2087 2088 2089 2090 2091 2092 2093 2094 2095 2096 2097 2098 2099 2100 2101 2102 2103 2104 2105 2106 2107 2108 2109 2110 2111 2112 2113 2114 2115 2116 2117 2118 2119 2120 2121 2122 2123 2124 2125 2126 2127 2128 2129 2130 2131 2132 2133 2134 2135 2136 2137 2138 2139 2140 2141 2142 2143 2144 2145 2146 2147 2148 2149 2150 2151 2152 2153 2154 2155 2156 2157 2158 2159 2160 2161 2162 2163 2164 2165 2166 2167 2168 2169 2170 2171 2172 2173 2174 2175 2176 2177 2178 2179 2180 2181 2182 2183 2184 2185 2186 2187 2188 2189 2190 2191 2192 2193 2194 2195 2196 2197 2198 2199 2200 2201 2202 2203 2204 2205 2206 2207 2208 2209 2210 2211 2212 2213 2214 2215 2216 2217 2218 2219 2220 2221 2222 2223 2224 2225 2226 2227 2228 2229 2230 2231 2232 2233 2234 2235 2236 2237 2238 2239 2240 2241 2242 2243 2244 2245 2246 2247 2248 2249 2250 2251 2252 2253 2254 2255 2256 2257 2258 2259 2260 2261 2262 2263 2264 2265 2266 2267 2268 2269 2270 2271 2272 2273 2274 2275 2276 2277 2278 2279 2280 2281 2282 2283 2284 2285 2286 2287 2288 2289 2290 2291 2292 2293 2294 2295 2296 2297 2298 2299 2300 2301 2302 2303 2304 2305 2306 2307 2308 2309 2310 2311 2312 2313 2314 2315 2316 2317 2318 2319 2320 2321 2322 2323 2324 2325 2326 2327 2328 2329 2330 2331 2332 2333 2334 2335 2336 2337 2338 2339 2340 2341 2342 2343 2344 2345 2346 2347 2348 2349 2350 2351 2352 2353 2354 2355 2356 2357 2358 2359 2360 236

... ..

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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The above items were returned to the Bureau on 11-17-68.

court gave due consideration to the report of the special commissioner and to the exceptions thereto. Defendant complains of the order of October 10, 1944, requiring him to pay attorney's fees. The only objection he voiced to this order is that it is based on the "void order of October 28, 1943, and is therefore also void". The order of October 28, 1943 was not void. In our opinion, the order of October 10, 1944 is valid.

Defendant complains that Commissioner Abrams never qualified as a special commissioner, and that he was disqualified from so acting. On December 11, 1942 the court entered an order referring all pending motions to Commissioner Abrams. The record does not show that defendant objected to this order. On July 26, 1943 defendant filed a motion, supported by an affidavit, to vacate the order of reference to Commissioner Abrams. Commissioner Abrams' report was filed on October 28, 1943. The defendant appeared before Commissioner Abrams and participated in the hearing without objection. Any requirement that the special commissioner take an oath of office was waived by the conduct of defendant. Had he raised this point in due time, it would have been a simple matter for Commissioner Abrams to have taken the oath. Defendant also complains that Commissioner Abrams was partial. This charge is not supported by the record. Defendant states that Commissioner Abrams took into consideration, in making his recommendations, the report of the Bureau of Public Welfare. While the defendant, in his exceptions, objected to the use of this report, it does not appear that during the hearings he made any objection to the introduction of the report. The inference from the record is that the report was received without objection. Finally, defendant urges that the custody of the child should be awarded to him. Our view is that the record supports the action of the chancellor

court have been considered in the report of the special investigator
and to the exceptions thereto. After the hearing of the order
of October 10, 1944, requiring him to pay attorney's fees, the
only objection he voiced to this order is that it is based on the
"void order of October 25, 1944, and is therefore also void." The
order of October 25, 1944, was not void. In the interim, the order
of October 10, 1944, is valid.

Defendant contends that his commission expires on July 1, 1945,
which is a special circumstance, and that he is entitled to
an order. On December 11, 1944, the court rendered an order
all pending actions to comply with the order. The court has not
shown that defendant is entitled to this order. On July 1, 1945, defendant
filed a motion, supported by an affidavit, to vacate the order of
reference to the arbitrator. Defendant's motion was denied. On July 1, 1945,
defendant filed an order of October 25, 1944. The order was rendered by the arbitrator
Arbman and participated in the hearing. Defendant's motion was denied.
Next that the special investigator told him that the order was denied
by the court of appeals. He is entitled to this order in the interim.
It would have been a timely order for him to have an order to have
taken the oath. Defendant also contends that his commission expires
on October 1, 1945. This order is not supported by the record. Defendant
states that his commission expires on July 1, 1945, in which
his recommendation, for report of the report of his office.
While the defendant, in his exceptions, objected to the use of this
report, it does not appear that during the hearing he made any
objection to the introduction of the report. The latter was taken the
word is that the report was received without objection. Finally,
defendant urges that the validity of the affidavit should be limited to
him. Our view is that the report supports the action of the arbitrator

in awarding the custody of the child to the plaintiff.

The order of October 28, 1943 is modified so as to reduce Commissioner Abrams' fees to \$84.50. As modified, the orders and decree of the Superior Court of Cook County are affirmed.

ORDERS AND DECREES AFFIRMED AS MODIFIED.

KILEY AND LUPE, JJ. CONCUR.

in awarding the custody of the child to the mother.

The order of custody is, that the mother shall have the custody of the child.

The father shall have the custody of the child until the mother is able to care for the child.

The mother shall have the custody of the child until the father is able to care for the child.

Witness my hand and seal of office this 1st day of June 1901.

JOHN W. HARRIS, Clerk of the Court.

43064

HARRY L. HOPE and MYRA D. HOPE,
Appellees,

v.

PETER DOLAN,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Harry L. Hope and Myra D. Hope, husband and wife, filed a complaint in the Superior Court of Cook County against Peter Dolan for personal injuries and property damage to their automobile, arising out of a collision, charging various acts of negligence on the part of defendant which proximately caused the injuries and damage. Defendant denied the allegations of negligence. He also filed a counterclaim charging acts of negligence, including the failure of plaintiff, Myra D. Hope, to obey a stop sign at an intersection. He claimed his automobile was damaged. Plaintiffs, as counterdefendants, denied the acts of negligence. A trial before the court and a jury resulted in a verdict finding plaintiffs guilty and assessing the damages on the counterclaim in the sum of \$75.00. The court granted plaintiffs a new trial. Defendant's petition for leave to appeal from the order granting a new trial was allowed.

The accident occurred at the intersection of 49th Avenue and 25th Street in Cicero on May 9, 1941 at about 5:15 p.m. Twenty-fifth Street, on which are laid street car tracks for east and westbound trolley cars, is about 36 feet wide, and runs in an easterly and westerly direction. Forty-ninth Avenue runs in a northerly and southerly direction and is about 22 feet wide. Both streets are paved with brick. There is a 6 foot parkway on each side of 25th Street. All of the corners of the intersection were vacant, except the southwest corner, on which there was a two story building. It was a

HARRY L. HOPE and MYRA E. HOPE,

Appellants,

v.

PETER EXEL,

Respondent.

MR. PRESIDING JUSTICE JOHN J. HANCOCK delivered the opinion of the court.

Harry L. Hope and Myra E. Hope, husband and wife, brought a complaint in the Superior Court of the County of San Francisco for personal injuries and damages caused by their negligence, arising out of a collision, involving various acts of negligence on the part of defendant which proximately caused the injuries and damages. Defendant denied the allegations of negligence, and filed a counterclaim alleging acts of negligence, injury and damages to plaintiff, from a collision, to wit: a collision between the automobile of plaintiff and a certain automobile in the section. He claimed the automobile was a 1921 Buick, and counterclaimed, denied the acts of negligence, injury and damages. The court and a jury resulted in a verdict finding plaintiff guilty and assessing the damages to the automobile in the sum of \$2,000. The court granted plaintiff's appeal and set aside the verdict for leave to appeal from the court's ruling a new trial was allowed.

The accident occurred at the intersection of 25th Avenue and 25th Street in Chicago on May 5, 1921 at about 5:15 p.m. Twenty-fifth Street, on which one of the cars was traveling, runs in a westerly and westerly direction. Twenty-fifth Avenue runs in a northerly and southerly direction and is about 12 feet wide. Both streets are paved with brick. There is a 6 foot roadway on each side of 25th Street. All of the corners of the intersection were vacant, except the southwest corner, on which there was a two story building. It was a

clear and dry day. George C. Barnhart, called by plaintiffs, testified that he was an accountant for the Western Electric Company; that he was acquainted with Harry Hope, one of the plaintiffs; that he saw the accident; that he was driving his car in a southerly direction on 49th Avenue and had stopped at 25th Street; that he saw plaintiffs' car moving slowly into the intersection and at the same time saw defendant's car going west on 25th Street at about 35 miles an hour; that the cars collided at the intersection; that plaintiffs' car turned over upon its side and slid in a north-westerly direction and that defendant's car came to a stop almost at the point of impact. He testified further that there was no stop sign at the intersection at the time of the accident, but that there was a stop sign there about two weeks later. On cross-examination he stated he was not positive that the Hope car, going north, was completely stopped, and that he had told the police officers he did not know how the accident happened. Another witness for plaintiffs, John C. Gates, testified that he was also employed by the Western Electric Company; that he was riding in the same car with Mr. Barnhart, sitting in the rear seat; that he had been reading a paper and looked up to see the Hope car careening across the road toward the car he was seated in; and that at the time of the accident there was no stop sign on either side of the street. Mrs. Hope, one of the plaintiffs, testified that she was driving her husband's Plymouth sedan; that it was almost a new car and had traveled less than 500 miles; that she brought the car to a stop before she reached 25th Street; that she started across the street; that there were two cars about half way down the block coming from the east toward 49th Avenue; that the next thing she knew her car was struck a blow; that she did not see the car that struck her; and that she received cuts and bruises and an injury to her shoulder and was hospitalized. On cross-examination she testified that 25th Street

clear and dry day. George O. Gentry, called as a witness, testified that he was an accountant for the Western Electric Company and was acquainted with Harry Kane, one of the witnesses; that the accident, that he was driving his car in a southerly direction on 45th Avenue and had stopped at 45th Street; that he was looking for moving slowly into the intersection and at the same time defendant's car going west in 45th Street; that the same accident at the intersection of 45th Street and 45th Avenue turned over upon its side and all four wheels were in the air; that defendant's car came to a stop about 10 feet west of the intersection. He testified further that there was a car at 45th Street at the time of the accident, but that he did not know the car; about two weeks later, on cross-examination, he testified that he was positive that the "top" car, which was a Buick, was the car that he had told the police officers was the car that was involved in the accident. Another witness, the plaintiff, testified that he was also employed by the Western Electric Company and was riding in the car on the day of the accident; that he had been talking to a man who looked like the man who was carrying across the road to the car and that he was at the time of the accident there was no one else in the car; the street, Mrs. Kane, one of the witnesses, testified that she was driving her husband's Buick car; that it was about 10 feet west of the intersection and had traveled less than 100 feet; that she started across the street; that there were two cars about half past the clock coming from the east toward 45th Avenue; that the next thing she knew her car was struck a blow; that she did not see the car that struck her; and that she received cuts and bruises and an injury to her shoulder and was hospitalized. On cross-examination she testified that both streets

was a very busy thoroughfare; that the nearest car to her on 25th Street as she started to cross, was approximately 300 feet away; that when she put her car in motion to cross the street she looked straight ahead to the north and was not looking to the east; and that she did not know whether there was a stop sign at 25th Street. Mrs. Hope, called in rebuttal, testified that in talking to Officers Connerty and Klich shortly after the accident, she did not make a statement to either of them that she estimated or believed she was going 20 miles an hour. Earl Burk, also employed by the Western Electric Company, called by plaintiffs, testified that he was driving a car in a southerly direction on 49th Avenue near the intersection of 25th Street at the time of the occurrence; that his car was the third car in line north of the intersection on 49th Avenue; and that the car coming west was going over 30 miles an hour. On cross-examination he stated that when he first saw the northbound car, it was traveling across the intersection; that there are stop signs at the intersection, but that he did not think there were any stop signs at the time of the accident; that there were stop signs there at one time and they were down and put up again. Harry Hope testified that he worked for the Western Electric Company; that the repair bill for his car was \$217.60 and the doctor's bill 150.00. On cross-examination he stated that he did not know whether there were any stop signs at the intersection at the time of the accident.

Lester Connerty, a police officer of the town of Cicero for 8½ years, testifying for defendant, stated that he was called to the scene of the accident to make an investigation; that there were stop signs at the intersection; that for a period of 12 years he had known there were stop signs at the intersection, with the exception of the one at the northwest corner; that this stop sign was occasionally taken down by the boys playing in the vacant lot; that the boys would take down the sign so they would not run into it; that after they

finished they would replace the sign; that he never knew of the stop sign being down on the southeast corner; that he and his partner had a conversation with Mrs. Hope immediately after the accident; that she was asked what happened when she came to the intersection, and that she stated she slowed down and proceeded to cross. Witness testified further that he and his partner had a conversation with the driver of the southbound car, Mr. Barnhart, and he admitted he did not see the accident as he was looking in a different direction. Officer Connerty identified Exhibits 2, 3 and 4, which were pictures of the intersection showing stop signs for traffic moving north and south on 49th Avenue, as truly portraying the condition of the street at the intersection as it was on the day of the occurrence. These pictures were taken during the month of December, 1943, about the time defendant filed his counterclaim. Officer Connerty testified that there were stop signs at 25th Street on the day of the accident. Officer Louis Klich, called by defendant, testified that he lived in Cicero for 22 years; that on the day of the accident there were stop signs at the intersection in favor of east and westbound traffic; that the stop signs were on 49th Avenue and the stop street was 25th Street; that the photograph portrayed the intersection as it was on the day of the occurrence; that he had a conversation with Mr. Barnhart at the scene of the accident; that the latter told him he was looking in a different direction and could not give him any information as to how the accident occurred; that he had a conversation with Mrs. Hope; that she told him she did not stop for the stop sign, but that she slowed up and proceeded across; that from his investigation no one indicated to the police that Mr. Dolan's car was going 30 or 35 miles an hour; and that his information was, as noted on the report, that both cars were going 20 miles an hour. He stated that both defendant and Mrs. Hope told him they were going 20 miles an hour.

finished they would replace the sign; that he never saw of the sign
 sign being down on the southeast corner; that he saw the sign
 a conversation with Mrs. Hope immediately after the accident; that
 she was asked what happened when she saw the sign; that she
 that she stated she drove down and proceeded to remove the sign
 testified further that he saw his father and a conversation with
 the driver of the automobile, Mr. Thompson, that he stated
 did not see the accident as he was driving on a different street
 Officer Connors identified Exhibit A, a sign, as a sign
 of the intersection and the sign for traffic light
 south on 42nd Street, as truly representing the accident of 1934-35
 at the intersection as it was on the day of the accident, 1934-35
 pictures were taken during the month of March, 1934, about the
 time defendant filed his complaint. The pictures identified that
 there were two signs at 42nd Street on the day of the accident.
 Officer Louis Wild, called by defendant, testified that he lives in
 Chicago for 22 years; that on the day of the accident there were two
 signs at the intersection in favor of cars and westbound traffic;
 that the stop signs were on 42nd Street and the sign which was
 given; that the photograph given by the defendant as it was on
 the day of the accident; that he had a conversation with Mr. Thompson
 at the scene of the accident; that the latter told him he was looking
 in a different direction and could not give him any information as to
 how the accident occurred; that he had a conversation with Mrs. Hope;
 that she told him she did not stop for the sign, but that she
 slowed up and proceeded across; that from his investigation no one
 indicated to the police that Mr. Thompson's car was going 30 or 35 miles
 an hour; and that his information was, as stated on the report, that
 both cars were going 30 miles an hour. He stated that both defendant
 and Mrs. Hope told him they were going 30 miles an hour.

Peter Dolan testified that at the time of the accident he was going west in the line of traffic, straddling the rail nearest the center; that as he approached 49th Avenue he first saw plaintiffs' car when it was about 25 or 30 feet to the south of him, at which time he was about the same distance from 49th Avenue; that he was going about 15 or 20 miles an hour; that plaintiffs' car was going about 20 miles an hour; that after the accident he asked the driver of the car going south on 49th Avenue whether he had seen the accident and that he answered, "No"; that the name of this driver was Mr. Barnhart; and that the cost of the repairs to his (defendant's) car was \$148.02. James Brodka testified that he had been employed by the Public Works Department of the Town of Cicero for 8 years; that his work dealt with replacing signs, painting pedestrian lines and all general work; that there was "a stop sign" at the intersection of 25th Street and 49th Avenue for north and southbound traffic on 49th Avenue; that he knew those signs to be there for about 8 years; and that he did not know those signs were ever down. The photographs which were taken in December, 1943, more than two years after the accident, show stop signs at the intersection for traffic proceeding north and south.

From a colloquy between the court and counsel at the time of the ruling on the motion for a new trial, it is apparent that the only ground for such ruling was that the verdict was against the manifest weight of the evidence. The parties do not complain of the admission or exclusion of evidence, or as to the instructions. After defendant rested, plaintiffs asked that a verdict be directed on the evidence and for that purpose submitted instructions to the court. The court said: "If you will hand them up now, I will deny the motion, dispose of them and keep the record straight. They are all denied. In other words, this is a

Robert Golon testified that at the time of the accident

he was going west in the line of traffic, approaching the toll

nearest the center; that as he approached the toll he saw

plaintiff's car when it was about 25 to 30 feet in front of

him, at which time he was about the same distance from the toll;

that he was going about 15 or 20 miles an hour; that plaintiff's

car was going about 15 miles an hour; that after the accident he

asked the driver of the car which caused the accident whether he

had seen the accident and that he answered, "No; that the man of

this driver was Mr. Harburt; and that the man of the car which

he (defendant's) car was 140.00. James Frank, plaintiff's car, has

been employed by the Public Works Department of the City of Chicago

for 8 years; that his work dealt with road work, grading, filling

potholes, filling in and all general work; that he was a "road man"

at the investigation of this accident and that he was not

employed there on 42nd Street; that he was not there at the time

there for about 8 years; and that he did not know what happened

over down. The photographs which were taken at the scene, 42nd

more than two years after the accident, and that he was at the

intersection for that is immediately north and south.

From a colloquy between the court and counsel of the

time of the ruling on the motion for a new trial, it is apparent

that the only ground for such ruling was that the verdict was

against the weight of the evidence. The verdict was not

complain of the admission or exclusion of evidence, or as to the

instructions. After defendant rested, plaintiff asked that a

verdict be directed on the evidence and for that purpose submitted

instructions to the jury. The court said: "If you will hand

them up now, I will deny the motion, dispose of them and read the

record straight. They are all denied. In other words, this is a

case, that is, one which peculiarly presents a question of fact for the jury." Defendant urges that the court erred in ruling that the verdict was against the manifest weight of the evidence, while the plaintiffs insist that the trial judge did not abuse his discretion in granting plaintiffs' motion for a new trial. There was a substantial difference of opinion as to the speed of the automobiles, whether or not there was a stop sign on 49th Avenue affecting traffic moving north and south on that street, and whether or not plaintiff stopped her automobile at 25th Street before going into the intersection. There is a sharp conflict in the testimony of the witnesses as to the speed of defendant's automobile, some testifying it was proceeding at a speed of from 30 to 35 miles an hour, and others indicating it was going between 18 and 20 miles an hour. It is undisputed that defendant's automobile stopped almost immediately at the point of impact. Plaintiffs suggest that the reason it stopped so suddenly is that it struck the automobile of plaintiffs broadside and could not proceed. As to the speed of plaintiff's automobile, defendant testified that she was going 18 to 20 miles an hour, while the testimony in her behalf is that her car was traveling at a much slower speed. The physical facts, however, tend to support the testimony introduced by defendant. There is also a sharp conflict in the testimony as to whether there was a stop sign at the intersection. Two police officers testified that there was a stop sign there at the time of the accident, as did the employee of the Public Works Department. Defendant did not know whether there were any stop signs there. Mrs. Hope did not remember whether she saw any stop signs. Three witnesses for plaintiffs testified that there were no stop signs there at the time of the accident. The witnesses who drove north and south across the intersection testified that they did in fact stop at 25th Street.

At the time of the hearing of the motion for a new trial, the court said: "I think it seemed evident from all the evidence that the stop sign was there." There was also a dispute in the testimony as to whether Mrs. Hope stopped for 25th Street before proceeding across. We are satisfied that the verdict of the jury was not against the manifest weight of the evidence. It was in accordance with the evidence. We are of the opinion that the action of the trial court in granting a new trial was an abuse of discretion.

Therefore, the order of the Superior Court of Cook County granting a new trial is reversed and the cause remanded with directions to proceed in due course. (Mavenaugh v. Ashburn, 327 Ill. 204).

ORDER REVERSED AND CASE
REMANDED WITH DIRECTIONS.

KILBY AND LUPE, JJ. CONCUR.

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Journal of Management Education 30(6)

42708

DONALD W. LITTLE, WALTER J.
SWEESY, and RALPH D. HILL,

Plaintiffs - Appellants,

v.

JOE GOGOTZ,

Defendant - Appellee.

APPEAL FROM

SUPREME COURT

COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action with a verdict and judgment against plaintiffs who have appealed.

On September 15, 1940, a clear dry Sunday, about 2 P.M. Casteel was driving plaintiffs north on Wood Street (State Route 49) and defendant was driving west on 155th Street in Harvey, Illinois. The automobiles collided and plaintiffs were injured. Both streets carry four lanes of traffic and Wood Street is a through street protected by stop signs, one of which was placed about 10 or 15 feet east of the northeast corner, controlling the east and west bound traffic. A house stood on the northwest corner of the intersection, but the other corners were vacant. Hedges bordered the southeast corner 100 yards south of which, on the east side of Wood Street, a hospital was located. After the collision Casteel's car struck a car southbound on Wood Street. Plaintiffs alleged and were required to prove their due care, defendant's negligence and their injuries proximately caused thereby.

The evidential disputes revolved about the speed of defendant's car and whether he stopped at the stop sign. Testimony for plaintiffs is that Casteel was driving in the easternmost lane about 35 miles per hour; that he reduced the speed about 30 or 40 feet from the intersection at which time defendant's car was about

RONALD W. LITTLE, WILLIAM D.
SMITH, and WILLIAM D. SMITH

Plaintiffs - Respondents

v.

JOE BROWN

Defendant - Appellant

IN THE SUPREME COURT OF THE STATE OF TEXAS

Appeal from the County Court of Tarrant County, Texas.

Judgment of the County Court affirmed.

On September 12, 1940, the following facts were established:

Defendant was driving north on the main highway at the intersection of the

and defendant was driving west on the main highway at the intersection of the

The automobiles collided at the intersection of the main highway and the

carry over lanes of traffic and the collision occurred at the intersection of the

protected by stop signs, and it was found that the collision occurred at the

first east of the northeast corner, south of the intersection of the main

bound traffic. A cross street to the northeast of the intersection of the

section, but the other streets were closed. The collision occurred at the

southeast corner 100 yards north of the intersection of the main highway and the

street, a hospital was located. The collision occurred at the intersection of the

street a car southeast on the main highway. The collision occurred at the

required to prove their case, and the collision occurred at the intersection of the

injuries proximately caused thereby.

The evidential issues involved about the facts of

defendant's car and whether he stopped at the stop sign. The following

for plaintiff is that defendant was driving in the eastbound lane

about 35 miles per hour; that he reduced the speed about 30 or 40

feet from the intersection at which time defendant's car was struck

75 or 100 feet to the east; that as Casteel drove into the intersection defendant's car was 10 or 15 feet east of the stop sign going 45 miles per hour; that defendant's car continued straight at that speed and struck Casteel's as the latter swerved west to avoid the accident; and that the accident occurred north of the center line of 155th Street. Testimony for defendant is that he was driving west at about 20 or 25 miles per hour, stopped just west of the stop sign, looked both ways, but could not see very far south because of the hedges; that he started again, slowed down at the intersection, saw Casteel's car about "100 and some feet" away; and that he drove into the intersection in first speed.

Plaintiffs argue that defendant should have yielded the right of way under Section 70 of the Motor Vehicle Act, (Chapter 95½, Ill. Rev. Stats.), which requires that vehicles entering upon or crossing State Highways come to a full stop as near the highway ~~XXXXXX~~ as possible and give the right-of-way to vehicles thereon. There is no question that Wood Street at the place in question is a State Highway. Plaintiffs argue that not only did defendant not yield the right-of-way, but that undertaking to cross first, he did not proceed at sufficient speed to avoid the accident. They also argue that his car was driven at an excessive speed rate. We are referred to several cases in this and other Appellate Courts of the State wherein it was decided as a matter of law that motorists who failed to yield the right-of-way to cars approaching 125 feet or so away were guilty of contributory negligence. Considering defendant's testimony as true and the legal inferences most strongly in his favor, we cannot say as a matter of law that he was negligent. We believe that reasonable men might differ in their conclusions on the question, and that is sufficient to take the case to the jury. Furthermore, we cannot say that the question of his negligence on this point is so clearly shown by the evidence as to make the verdict

75 or 100 feet to the east; that is, I have seen the car
section defendant's car was 10 or 15 feet east of the
45 miles per hour; in defendant's car, defendant's car was
speed and struck defendant's car; and that the car was
accident; and that the car was struck by the car
155th Street. Defendant's car was struck by the car
at about 10 or 15 miles per hour, struck the car
looked back again, but could not see the car
hedge; that he struck the car, and that the car
Gastel's car about 10 or 15 feet east of the car
the intersection in front of the car.

Defendant's car was struck by the car
right of way under section 10 of the Vehicle and Traffic Law
334, 111, 101, 102, which states that a vehicle shall not
on crossing street shall not cross a full stop line on a highway
XXXXXX as possible and live on the right-of-way of the highway.
There is no question that defendant's car was in the right-of-way
a State Highway. Defendant's car was in the right-of-way of the
yield the right-of-way, and that defendant's car was in the
not proceed at sufficient speed to yield the right-of-way to the
argue that his car was driven at an excessive speed, and that
referred to several cases in this and other jurisdictions where the
State therein it was decided as a matter of law that the car
failed to yield the right-of-way to a car on a highway. The fact is
away were guilty of contributory negligence. Defendant's car
testimony as true and the legal consequences were clearly in his
favor, we cannot say as a matter of law that defendant's car
believe that reasonable men might differ in their conclusions as
the question, and that is sufficient to take the case to the jury.
Furthermore, we cannot say that the question of the negligence on
this point is so clearly shown by the evidence as to make the verdict

unfair. It is true that witnesses for the defendant testified that his car stopped for "2 minutes" and "3 minutes" at the stop sign, but we think their full testimony was sufficient to obviate the apparent improbability of this testimony. The jury saw these witnesses and the question of their credibility was for the jury.

Plaintiffs also argue that physical facts surrounding the accident clearly show the inherent incredibility of the defense testimony. We have studied the photographs which do not show the front of Casteel's car, and which indicate that the force of the collision was borne by the right side of the car from the right front wheel back to about the middle. The pictures of the defendant's car indicate that the left side of the front and front of the left side bore the brunt of the collision with comparatively little damage to the right front. Since the evidence is that defendant's car did not change direction and that Casteel's car swerved to the left before the accident, and because the pictures of the latter indicate considerable scraping, we think that this physical evidence would not outweigh an inference by the jury that defendant's car was proceeding, as he said, at a slow rate of speed. The fact that the collision caused a loud report, does not of itself indicate that the defendant was driving fast.

Plaintiffs say that the defendant's car could not have reached the intersection first because if it had and their car was 100 feet south, defendant would have inevitably crossed the easternmost lane of Wood Street, because he was driving close to the north curb; and that if defendant's testimony is true, plaintiffs' car would have had to be driven ten times as fast as defendant's through the intersection. There was testimony that defendant slowed down and entered the intersection at about "2 or 3", "4" and "5" miles an hour, in first speed. This was sufficient to enable the jury to resist the inferences which plaintiffs point out.

We believe on the question of the right of way, a reasonable construction would not require that defendant stop his car either at the stop sign or at the intersection line long enough to permit any car that he observed on the highway to pass, regardless of its distance from the intersection. (Leech v. Newell, 323 Ill. App. 510 (66 N. E. (2nd) 138). Defendant here exercised his judgment and "thought" there was sufficient time for him to cross the intersection. We cannot say that under the circumstances reasonable men would not differ as to whether his judgment was good or bad, therefore, it was for the jury to determine whether his judgment came up to the standard of the average man in the community. We have studied the evidence and cannot say that if the jury found the defendant was not negligent that its conclusion was manifestly against the weight of the evidence.

There is no question of contributory negligence of plaintiffs in the case, nor is any point made on instructions, so we presume both parties were satisfied that the jury understood what elements were involved in their verdict.

The deposition of Adams, driver of the southbound car which was sideswiped by Casteel's car following the collision was read as part of plaintiffs' case. In it Adams acknowledged signing a written statement, to which he was referred; that the pages appeared to be in the same condition as when he signed them; and that though there were some interlineations and "confusion", no changes that he knew of were made since he signed them. As part of defendant's case, the written statement referred to was offered in evidence and objection was made. From the deposition it appears that after Adams had identified the statement, plaintiffs' counsel wanted to see it, but defense counsel refused to permit him, saying that he did not intend to offer the statement unless Adams' deposition was read to the jury.

we believe on the question of the fact of guilt, a reasonable
construction would not require that the defendant also be shown
at the stop sign or at the intersection. The fact would be shown
any one that he observed at the stop sign or at the intersection of the
distance from the intersection. (Linton v. Linton, 1911, 100
(58 S. W. (2nd) 133). Defendant's counsel argues that the
"thought" there was sufficient evidence to show that the defendant
we cannot say that under the circumstances the evidence was sufficient
either as to whether the defendant was at the stop sign or at the
intersection. The jury is the judge of the facts and the law. It is
evidence of the facts and the law. It is the jury's duty to
evidence and cannot say that it is the jury's duty to find the
negligent that the defendant was negligent. It is the jury's duty to
the evidence.

There is no question of admissibility of evidence of negligence
in the case, nor is any question of admissibility of evidence of
both parties' negligence. The fact that the defendant was negligent
was involved in the verdict.
The fact that the defendant was negligent, before or after the accident, which
was alleged by the plaintiff, was not in issue. The fact that the
part of plaintiff's case. In it was a question of fact. The fact
statement, to which he was entitled; that the defendant was negligent
in the case condition of the defendant's case; and that the defendant
were some information and 'evidence', no evidence was shown of
were made since he signed them. As a matter of fact, the defendant's
written statement referred to as evidence in evidence and objection
was made. From the description it appears that the defendant's
identified the statement, plaintiff's, counsel argued to the jury that
defense counsel refused to permit him, saying that he did not intend
to offer the statement unless asked; objection was made to the jury.

The court admitted the statement, saying that if error was committed it could be corrected in the event the verdict required, but said that counsel should make every effort to produce Adams in court. Plaintiffs' counsel objected that any impeaching questions should have been asked Adams at the taking of the deposition, where he could then be interrogated about the circumstances surrounding the making of the statement. Portions of the statement marked by the court, contradicting Adams' deposition, were read to the jury. Adams thereafter appeared as a witness and was examined by plaintiffs' counsel. He denied the statement was in his handwriting; and said that he might have glanced at some of it before signing, but knows that he did not read part of it because it was "mixed up". He then testified to the manner in which the statement was taken, saying he did not write it and that it was not read to him before he signed. Plaintiffs contend that the court committed reversible error in admitting the statement in evidence and permitting it to be read to the jury, because under the Deposition Act, (Chapter 51, Sec. 30, Ill. Rev. Stats.) the impeaching statement should have been attached to the deposition and filed in the court. In support of this position he cites Levinson v. Fidelity & Casualty Co., 348 Ill. 495, where under similar circumstances the deponent died before the trial and the court said, that in a case where the witness died prior to the trial and a further examination of him became impossible, the admission in evidence of this statement was grossly prejudicial. We think whatever error, if any, was committed by the trial court in admitting the statement in evidence was removed when Adams testified personally. Plaintiffs' complain that they were prejudiced by the singling out of certain portions of the impeaching statement which emphasized those parts. This is not a valid objection because the same effect is produced in any impeaching testimony and moreover, we think Adams' testimony of the circumstances of the taking of the statement emphasized them in

plaintiffs'
~~xxx~~/favor. His appearance at the trial obviated any harm which might have been done to plaintiffs in this, or from withholding from sight of plaintiffs' counsel, the written statement at the taking of the deposition.

Plaintiffs complain that they were prejudiced by the trial court's refusal to permit Adams to testify whether he actually made the statement. The court stated that the only pertinent inquiry was into the circumstances of the signing and the condition of the written statement. Over defendant's objection Adams was permitted to testify that the statement was not in his handwriting; and that he did not read the statement before signing it. He then volunteered without a further question that he did not read some of it because you "got a mix up there". At this point the court said, "No, you have answered". The court then over objection permitted Adams to testify that he did not think he read the entire statement before he signed it. He also testified that the statement was taken in his office by some man for about an hour; and that he discussed the facts with the man for about 15 minutes and that the man then wrote for 45 minutes. The court sustained an objection to a leading question and Adams then testified that there was some, but not much, conversation between him and the investigator while the latter was writing; and that Adams signed five pages, but that the man did not read the statements to him before the signing. On cross-examination he said he assumed that the man wrote what Adams told him. There was no further examination by plaintiffs' counsel. We see no prejudice to plaintiffs nor any undue restriction in examination of Adams and it does not appear that their counsel wished to ask further questions. There is complaint that the proper foundation was not laid for its introduction. Counsel cites Mahannah v. Bergfeld, 274 Ill. App. 97 which supports their view that defendant's

plaintiffs'

xxx/level. His appearance at the trial showed that he was not
have been seen to plaintiff in 1914, or from 1914 to 1915
of plaintiff, counsel, and witness statement. The trial of the
decision.

plaintiff's counsel said that they were not prepared to
court's refusal to permit Adams to testify about the plaintiff's
the statement. The court asked him the only question in which the
into the circumstances of the trial and the plaintiff's trial
statement. Their statement's statement about the plaintiff's trial
that the statement was not in the hands of the plaintiff's trial
read the statement before signing it. He then refused to sign
a further question that he did not want to sign it. He then
a bit up there. It was said that the court said, "You have
The court then over objection called Adams to testify about the
not think he read the entire statement before he signed it. He also
testified that the statement was taken in his office in 1914 and that
about an hour; and that he discussed the facts with the plaintiff's
15 minutes and that the man then read the statement. The court
sustained an objection to a further question and Adams was called
that there was some, but not much, conversation between him and the
investigation while the latter was writing; and that Adams signed five
pages, but that the man did not read the statement in his office the
signing. On cross-examination he did so as well. The court
what Adams told him. There was no further questioning of plaintiff's
counsel. He was no objection to plaintiff's nor any other questioning
in examination of Adams and it does not appear that their counsel
wished to ask further questions. There is complaint that the proper
foundation was not laid for the introduction. Counsel after plaintiff's

counsel should have called Adams attention to the alleged contradictory portions of the statement and given him the opportunity to explain such inconsistencies. This decision is not in conformity with the rule stated in the Supreme Court in I. C. R. R. Co. v. Wade, 206 Ill. 523, wherein the distinction was made as to proper practice in the use of oral and written statements for purposes of impeachment and held that where the statement is written by the witness or signed by him a sufficient foundation is laid by showing the witness the paper, allowing him to inspect it and read it if he desires, and proving his signature. It is clear that at the taking of the deposition and the trial Adams admitted signing the written statement. This was sufficient foundation for its introduction. All other questions as to whether the statements were made, whether there were any interlineations, etc., were proper subjects for examination by plaintiffs' counsel. We cannot find that the court precluded plaintiff from interrogating Adams with reference to any "confusion" or interlineation. The record indicates that the court simply stopped Adams from volunteering information not responsive to the question. No fault can be attributed to defense counsel or the court for Adams failure to testify whether he had or had not made the statement.

Further complaint is made that the entire written statement should not have been admitted in evidence because the part under the subject of impeachment had to do with inflammatory evidence of the course of Casteel's car after the collision. The door to this evidence was opened by Plaintiff Little who testified to that course. Moreover, we must assume in the absence of any showing to the contrary, that the court conducted the trial with regularity and that the entire statement did not go to the attention of the jury and was not taken to the jury room by them. The record shows simply that the court ruled that the written statement should be received and that it later marked those portions to be read to the jury. While the impeaching parts of the statement were read to the jury before Adams testified, whatever

irregularity took place in this procedure was cured and we think to plaintiffs' advantage by later testimony of Adams.

We find no merit to the complaint that the court committed error in admitting evidence of the course of the car in which plaintiffs were riding after the collision. We have pointed out that the door to this evidence was opened by Little. It is claimed by plaintiffs that the evidence was immaterial. Defense counsel argue, and we believe, it had a bearing upon the cause of the accident. One witness, the owner of the home on the northwest corner of the intersection, upon whose property the car in which plaintiffs rode, ran after the accident, testified as to what "the man that drove up on the sidewalk" told him a couple of days after the accident. Upon plaintiffs' objection to the hearsay character of this testimony, the court reserved its ruling subject to defendant "connecting up" the testimony. There is no record that anything further was done to connect the testimony. The driver of the car did not testify. The testimony of the owner of the property upon this point was merely cumulative of that of other witnesses and we do not see that plaintiffs were prejudiced.

Complaint is also made that plaintiffs were prejudiced by the questions put to Adams regarding the damage to his car and that he made the impeaching statement with that damage in mind. Plaintiffs argue that by this testimony the jury was led to believe that Adams had a pecuniary interest and that plaintiffs might compensate him, or that Adams' claim was settled because it was just and plaintiffs' contested because it was unjust. We think the jury was entitled to consider the witnesses' answer that he "possibly" had his own damage in mind when he signed the statement.

Under all the circumstances of this case, we believe plaintiffs had a fair trial. We see no reason to disturb the verdict or judgment and the judgment is, therefore, affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND LUKE, J. CONCUR.

42710

GUSTAF NELSON and THORA B. NELSON,

Appellees,

v.

THE VILLAGE OF WINNETKA, a municipal
corporation and KINDER CONSTRUCTION
COMPANY, a corporation,

Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

32

16²

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action with verdicts in favor of Gustaf Nelson for \$1,250 and Thora B. Nelson for \$500. Both defendants appeal from judgments on the verdicts.

About 5 P.M. on January 9, 1941, Gustaf Nelson, a Winnetka business man, was driving northwesterly on Green Bay Road west of, and parallel to, the Chicago and Northwestern Railroad tracks in Winnetka, Illinois. His wife Thora was riding at his side. He turned from Green Bay Road east on to the approach to a temporary Tower Road bridge. His car came in contact with a westbound car and slid or rolled southeast off the south side of the approach down an embankment and both plaintiffs were injured. A trial was had on the allegations that defendants were negligent in failing to erect and maintain proper barricades on the south side of the approach to the bridge; failing to provide an approach of sufficient size; and failing to keep the bridge at the point of the accident free from dirt, mud and snow. Plaintiffs claim that as a proximate result of the alleged negligence, their automobile skidded and plunged down the embankment.

Defendant company had a contract with the Village to construct a permanent bridge over the Chicago and Northwestern Railroad Co. tracks and the tracks of the Chicago North Shore &

Milwaukee Railroad Co. at Tower Road. The Company under its contract was required to build a temporary bridge to accommodate traffic during the building of the permanent structure. August, 1939 the Company completed the temporary bridge which was 124 feet 6 inches long; 18 feet 3 $\frac{1}{4}$ inches wide from curb to curb; and at the west approach from the easterly edge of Green Bay Road to the center line of the bridge proper measured 35 feet. The upper part of the west approach was planked and the balance was surfaced with bituminous macadam. A sidewalk was set off on the north side of the bridge only; and a curbing of heavy timbers on the bridge proper was not carried down the south side of the west approach. It appears that temporary barricades were maintained on the south side of the approach in order that excavation trucks could move in and out of the cut being made to lower the grade of the tracks. The bridge was built according to village plans and specifications, 30 feet north of the old Tower Road crossing and of the permanent structure being built, and at right angles to the Green Bay Road and the tracks.

Defendants contend that there was no evidence which, with legal inferences in favor of plaintiffs, fairly tended to prove negligence and that even if negligence were shown, it was not the proximate cause of the injuries; and that the trial court should have sustained their motions for judgments notwithstanding the verdict.

There is evidence that the accident happened at dusk when the weather was misty and the temperature freezing, and that a film of icy clay covered the approach; that the north side of the west approach widened out at the intersection, but that on the south side the south line of the temporary bridge intersected the easterly line of Green Bay Road at a right angle; that a black and white striped post, placed by the Village near the point of intersection of those lines, was so located that Nelson was required to make a wide turn in order to turn east on the approach; that because of the black and white striped post and a telephone post a few feet farther east, he

was unable to see the westbound car until he was making the turn; that when he saw it he applied the brakes and skidded, as a result of which the cars brushed fenders in the westbound lane; and that Nelson's car skidded south across the approach through the temporary barricade down into the cut. It is our view that this was sufficient to take the case to the jury unless, as a matter of law, we can say that the evidence and its legal inferences considered most strongly in plaintiff's favor did not tend to prove that the Village was negligent in failing to provide a wider approach at the south side of the temporary bridge. Obviously, if the south side of the approach were widened, the black and white striped post would not have been in the place it occupied at the time of the accident. We have in mind the temporary nature of the bridge and realize that a temporary bridge is not required to be of the same degree of perfection as a permanent structure. It should be constructed, however, so that it will fulfill its purpose with due regard to the safety of those whom it is built to accommodate. The question is whether under the circumstances the Village can be considered imprudent for not having anticipated that motorists would turn east from Green Bay Road on to the approach and because of the position of the striped post and telephone post be forced to make a wide turn; that because of the position of the striped post and telephone post they might not be able to see westbound traffic until the turn was being made; that the operation of the excavation trucks would result in a film of clay over the surface of the approach which would become icy in freezing weather; and that prudent eastbound motorists who applied brakes as quickly as they saw westbound traffic might skid on the icy approach into the westbound lane and there might brush fenders with westbound cars and be forced south across the approach through the temporary barricade into the cut. It is our opinion that the jury was not unreasonable if it held the Village to that degree of foresight, and, consequently, the jury could properly find it negligent. Furthermore, taking Nelson's testimony as true,

was unable to see the westbound car until he was telling the jury that when he saw it he applied the brakes and skidded, as a result of which

the same witness testified to the westbound lane; and that Nelson's

car skidded south across the approach to the temporary bridge

down into the cut. It is our view that this evidence is not

the case to the jury unless, as a matter of fact, it is shown that the

evidence and the fact that the car skidded south across the approach

to the bridge is not true. It is our view that the jury should be

instructed to consider the evidence in the light of the fact that the

bridge. Obviously, if the car skidded south across the approach

to the bridge and skidded south across the approach to the bridge

accused at the time of the accident. It is our view that the jury

nature of the bridge and the fact that the car skidded south across

to be of the same degree of probability as a car skidded south

should be considered, however, as to whether the car skidded south

with the regard to the safety of those who are in the cut, it is our

The question is whether under the circumstances the jury can be

considered competent to judge whether the car skidded south across

turn east from Green Bay road as to the approach to the bridge

position of the skidded car and the fact that the car skidded

wide turn; that because of the position of the skidded car and

telephone booth they might not be able to see westbound traffic until

the turn was being made; that the position of the skidded car

would result in a film of clay over the surface of the approach which

would become icy in freezing weather; and that the fact that the

who applied brakes as quickly as they saw westbound traffic skid

on the lay approach into the westbound lane and there skidded south

temperatures with westbound cars and be forced south across the approach

through the temporary bridge into the cut. It is our view that

that the jury was not unreasonable if it held the village to that

degree of foresight, and, consequently, the jury could properly

find it negligent. Furthermore, taking Nelson's testimony as true,

we think the question of his due care was for the jury, for we cannot say from a consideration of the evidence hereinbefore recited, that he was guilty of contributory negligence as a matter of law. We are of the opinion that the question of negligence of the Village and the question of Nelson's due care were for the jury; and that there is ample evidence in the record to sustain a verdict against the Village.

There is no question that the timber curbing on the bridge proper was not extended down the south side of the west approach. It is at least a fair inference that at the time of the accident there was a kind of makeshift barricade of 3" or 4" X 1" cross-boards nailed to the west end of the bridge and to a brace temporarily set on the south edge of the west approach. This barricade was moved as the trucks carrying the excavated material moved in and out of the cut. Under its contract with the Village the company was required to exercise precaution to prevent accidents and to provide and maintain proper barricades to protect persons against injury. We believe as a matter of law that the company had no duty under the contract or otherwise to provide a barricade sufficient to prevent from going off the approach into the embankment an eastbound automobile which either skidded, or with steering wheel locked had rolled, south across the approach after brushing fenders with a westbound automobile in the westbound lane. The verdict against the company, therefore, cannot stand.

The judgment is reversed as to the company and affirmed as to the Village of Winnetka. (Minnis v. Friend, 360 Ill. 328; Fogel v. Clark Street Building Corp., 278 Ill. App. 286.)

JUDGMENT AFFIRMED IN PART
AND REVERSED IN PART.

BURKE, P.J. AT LUPE, J. CONCUR.

42720

FELIX SOBECZAK,

Plaintiff - Appellant,

v.

THE AMERICAN NATIONAL INSURANCE CO.,
a corporation and Stella Sobczak,

Defendants - Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from an order vacating and setting aside his ex parte judgment. A motion made in this court, by defendant Stella Sobczak, to dismiss the appeal was taken with the case.

Plaintiff sued October 10, 1940 on a policy of insurance, The American National Insurance Company and Stella Sobczak answered and the latter filed a counterclaim, based on the policy. Plaintiff answered the counterclaim. October 6, 1942 in an ex parte hearing before the court judgment was for plaintiff. November 2, 1942, a nunc pro tunc order, as of October 6, 1942, corrected the original judgment by finding the issues on the counterclaim for plaintiff and against Stella Sobczak. November 5, 1942, Stella Sobczak filed a petition to vacate and set aside the judgments of October 6th. The petition was thereafter amended and on November 25, 1942, plaintiff's motion to strike the petition and amendment was filed. December 28, 1942 the court overruled plaintiff's motion to strike, and sustained defendant's "motion"; and on January 21, 1943 amended that order by adding after the word "sustained" the words "and ex parte judgment of October 6, 1942 and November 2, 1942, is hereby vacated and set aside."

REPLY SHEET

REPLY SHEET - (continued)

v.

REPLY SHEET - (continued)

REPLY SHEET - (continued)

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REPLY SHEET - (continued)

REPLY SHEET - (continued)

The court had jurisdiction to vacate the judgments and its order doing so was not final but interlocutory,, and not appealable. Wolf v. Proviso Hospital Ass'n., 309 Ill. App. 479. The motion to dismiss is allowed and the appeal is hereby dismissed.

APPEAL DISMISSED.

BURKE, F.J. AND LUBE, J. CONCUR.

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42741

NATIONAL BOND & INVESTMENT
CORPORATION, a Corporation,

Plaintiff - Appellant,

v.

ARTHUR GRIER, JOHN DOE and MARY ROE,

Defendant - Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment for defendant and contends that the trial court erred in denying its motion for a change of venue. Appellee filed no brief in this court.

January 20, 1943, plaintiff filed its replevin suit to recover a Buick automobile or its value. The same day a replevin writ issued which was returned January 30, 1943 with the endorsement that neither the defendant nor property was found. February 5, 1943 an alias writ issued and was returned February 22, 1943 having been served on the defendant Arthur Grier by delivering a copy to his wife and informing her of the contents, but the return showed no property was found. A copy of the plaintiff's pleadings and the writ were mailed to Arthur Grier at his usual place of abode. Defendant filed no appearance but we infer from the record that on February 26, 1943, the return day of the alias writ, defendant's wife appeared in court and we further infer that the trial court set the matter for hearing March 17, 1943. March 11, 1943, plaintiff mailed a notice to Arthur Grier that it would present a motion for a change of venue March 17th. When the cause was called on March 17, 1943, plaintiff presented its motion which the court denied on the ground that trial had commenced February 26 and had been postponed.

NATIONAL BOND & INVESTMENT CORPORATION, a corporation,

Plaintiff - Appellant,

v.

ARTHUR WEISS, JOHN DOE AND HARRY WOE,

Defendants - Appellees.

APPEAL FROM

UNITED STATES COURT

OF DISTRICT

MR. JUSTICE KELLY delivered the opinion of the court.

Plaintiff appeals from a judgment for defendant and

contends that the trial court erred in denying its motion for a

change of venue. Appellee filed no brief in this court.

January 30, 1943, plaintiff filed its petition and

to recover a 1933 automobile on the value. It was set

pleading with issues which was returned January 30, 1943 with the

understanding that neither the defendant nor property was found.

February 5, 1943 an alias writ issued and was returned February 23,

1943, having been served on the defendant before his delivery

a copy to his wife and information part of the complaint. But the

return showed no property was found. A copy of the plaintiff's

pleadings and the writ were mailed to him after at his usual

place of abode. Defendant filed no answer but we infer from

the record that on February 23, 1943, the return day of the alias

writ, defendant's wife appeared in court and we further infer that

the trial court set the matter for hearing March 17, 1943. There

on March 17, 1943, plaintiff mailed a notice to return after that it would

present a motion for a change of venue March 17th. When the case

was called on March 17, 1943, plaintiff presented its motion which

the court denied on the ground that trial had commenced February 23

and had been postponed.

The transcript of the proceedings does not show what transpired February 26, 1943. It is apparent, however, from the return made on the writ since the automobile was not taken nor any forthcoming bond, that the replevin suit was substantially at an end. Bird-Sykes Co. v. McNamara, 252 Ill. App. 262. Under section 18 of the Replevin Act plaintiff then had the option of proceeding to recover the value of the automobile, less appropriate deductions (Brin v. Topp, 131 Ill. App. 394; Bird-Sykes Co. v. McNamara, 252 Ill. App. 262), and his statement of claim was designed for that purpose. There was nothing before the court in the replevin action and trial had not commenced for the value of the property and, since the petition for a change of venue appears to be properly drawn, the trial court had no alternative to granting the change of venue. Krueger v. Cummings, et al. 314 Ill. App. 492. The subsequent judgment, therefore, must be and hereby is reversed (Mockler v. Thomas & Co., 273 Ill. App. 121; Agar Packing & Provision Corp. v. United Packinghouse Workers, 311 Ill. App. 502) and the cause is remanded with directions to grant the change of venue.

REVERSED AND REMANDED WITH DIRECTIONS.

BURKE, P.J. AND LUPE, J. CONCUR.

The transcript of the proceedings was not even filed
 translated February 28, 1942. It is apparent, however, from the
 return made on the writ since the transcript was not filed for
 any forthcoming bond, that the execution was substantially
 at an end. First-Trust Co. v. First-Trust Co., 232 Ill. 40, 90, 100
 section 18 of the Revised Statutes of Illinois then the action of
 proceeding to recover the value of the mortgage, less appropriate
 deductions (First v. First, 131 Ill. 40, 90, 100; First v. First,
 131 Ill. 40, 90, 100), and the payment of the same was assigned
 for that purpose. There was nothing before the court in the
 review action and trial had not commenced for the trial of the
 property and, since the review for a change of venue was to
 be properly given, the trial court is no alternative to granting
 the change of venue. First v. First, 131 Ill. 40, 90, 100.
 492. The subsequent judgment, therefore, must be and hereby is
 reversed (First v. First, 131 Ill. 40, 90, 100; First v. First,
 131 Ill. 40, 90, 100). First v. First, 131 Ill. 40, 90, 100.
 and the same is remanded with directions to grant the change of
 venue.

REVEREND J. J. AND COURT, J. J. J.

42761

FRANCES R. GARVY,

Appellant,

v.

A. COSMOS GARVY,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

32-11A-18

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is the second appeal in this case. The first (Garvy v. Garvy, 310 Ill. App. 169) was from a decree dismissing plaintiff's suit for separate maintenance for want of equity. The instant appeal is from an order which denied to plaintiff support prior to October 10, 1941. Defendant filed in this court a motion in the nature of a plea of release of errors, asking that the order appealed from be affirmed. The motion was taken with the case.

This court in the prior appeal reversed the decree of January 15, 1940 and remanded the cause with directions "to enter a decree for separate maintenance in favor of plaintiff * * * with an allowance for support and maintenance commensurate with defendant's means". The mandate having been filed in the trial court, the cause was reinstated October 10, 1941. October 20, 1941 a decree was entered vacating the prior decree which dismissed plaintiff's action; finding plaintiff was entitled to separate maintenance; and ordering hearings to determine the amount of her allowance. July 2, 1942, a further decree was entered allowing plaintiff \$65 a month commencing October 10, 1941; reserving jurisdiction for the purpose of determining the request of plaintiff for support prior to October 10, 1941; and setting the hearing on "said request" for September 21, 1942. On December 23, 1942, the order appealed from was entered denying the request.

Defendant's motion to affirm the order denying support and maintenance prior to the filing of the mandate in the trial court is based upon plaintiff's acceptance of \$65 per month commencing October 10th, 1941, under the decree of July 2, 1942. The motion rests upon

42781

FRANCIS A. GARY,

Appellant,

v.

A. GEORGE GARY,

Appellee.

82-11-118

THE UNITED STATES DISTRICT COURT

This is the record of the proceedings in this case.

v. GARY, A. GEORGE, Appellee, and FRANCIS A. GARY, Appellant.

But for certain circumstances, the case would be decided in favor of the appellant.

appeal is from an order which denied the plaintiff's motion for summary judgment.

October 10, 1941. Defendant filed in this court a motion for summary judgment.

Nature of a case of review of summary judgment. The court is asked to review the summary judgment.

appealed from the summary judgment. The court is asked to review the summary judgment.

This court is asked to review the summary judgment.

January 12, 1942 and remanded the case to the district court for further proceedings.

a decree for separate maintenance in favor of the plaintiff.

an allowance for support and maintenance for the plaintiff.

remains. The matter is now pending in the district court.

case was remanded to the district court for further proceedings.

was entered upon the record which shows that the plaintiff's

action; finding plaintiff was entitled to separate maintenance; and

ordering plaintiff to determine the amount of her allowance. July 2,

1942, a further decree was entered allowing plaintiff \$5 a month

commencing October 10, 1941; retaining jurisdiction for the purpose

of determining the request of plaintiff for an order to compel

10, 1941; and setting the hearing on said request. The respondent

21, 1942. On December 21, 1942, the order was entered and entered

denying the request.

Defendant's motion to affirm the order denying support and

maintenance prior to the filing of the mandate in the trial court is

based upon plaintiff's acceptance of \$5 per month commencing October

10th, 1941, under the decree of July 2, 1942. The motion rests upon

the theory that, having accepted benefits under the decree, plaintiff under Boylan v. Boylan, 349 Ill. 471, has released all errors that may have occurred in that decree. The motion presupposes that the order of December 23, 1942 is part of the July 2nd decree. If the later order is merged in the prior decree, the Boylan case applies, otherwise not. We think a mere reading of the July decree plainly shows that it did not dispose of plaintiff's contention relating to support and maintenance prior to October 10, 1941, but reserved jurisdiction to determine the question. The allowance of \$65 per month after October 10, 1941, did not, therefore, in itself dispose of plaintiff's contention for prior support. The decree by its terms indicates that the court was to determine that question in the future. We have not, therefore, a situation where the court having decided the issue leaves only the settlement of details to carry the decision into effect; but a situation where determination of an important issue is deferred to a later date. We hold, accordingly, that the order of December 23, 1942, stands as a separate order from which plaintiff was entitled to appeal. By accepting benefits, therefore, under the decree of July 2, 1942, she did not prejudice her right to complain of error in the order of December 23, 1942. Defendant's motion is, accordingly, denied.

When the decree of January 15, 1940 dismissing plaintiff's cause for want of equity was entered, there was pending a petition for support and maintenance, etc. filed August 8, 1939. The hearing thereon had been continued "to the trial of this cause". The effect of the decree after the trial of the cause was to deny the prayer for support. Reversal of that decree removed that effect and the mandate clearly directed that the allowance should commence on the date of the petition of August 8, 1939. The order of December 23, 1942 is, therefore, reversed and the cause is remanded with directions to the trial court to allow plaintiff support and maintenance from August 8, 1939, commensurate with defendant's means.

REVERSED AND REMANDED WITH DIRECTIONS.

BURKE, P.J. AND LUPE, J. CONCUR.

42835

MARIE NOONAN,

Plaintiff - Appellee,

v.

CHICAGO MOTOR COACH CO., a
corporation,

Defendant - Appellee,

On Appeal of Petitioner EDWARD C.
STEINHAEUER, on petition for
attorney's lien,

Petitioner - Appellant.

APPEAL FROM

CIRCUIT COURT

JOHN COUNTY.

8241.6-19

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal and a cross-appeal by two of three attorneys who filed petitions for enforcement of attorneys' liens against plaintiff's judgment in this action.

November 17, 1940, plaintiff was injured by a Chicago Motor Coach Company bus. November 30, 1940 she employed Edward C. Steinhauer as her attorney, agreeing in writing to pay him a sum equal to 25 percent in the event of settlement of, and 33 1/3 percent in the event of suit upon her claim. November 5, 1941, after having discharged Steinhauer, she employed Seymour M. Cohen, agreeing in writing to pay him a contingent fee of 50 percent of whatever she recovered through his efforts on account of her claim. November 24, 1941, Cohen and Steinhauer made an agreement in writing whereby Cohen was to prosecute the claim and file suit and Steinhauer was to receive a sum "equal to 1/6 of the total amount collected", either through compromise or judgment. May 12, 1942, after having discharged Cohen, plaintiff employed Joseph Barbera agreeing in writing to pay him 33 1/3% of any amount collected through suit or compromise.

In September of 1942 the cause was tried and verdict was for plaintiff in the amount of \$12,500. Thereafter, in December 1942,

WILLIAM HARRIS

Witness - Plaintiff

CHAS. H. HARRIS, JR.
Attorney for Plaintiff

Witness - Defendant

On behalf of Defendant
WILLIAM HARRIS, JR.
Attorney for Defendant

Witness - Defendant

MR. JUSTICE WILLIAM HARRIS

This is an appeal from a judgment of the Circuit Court of the United States for the District of Columbia, entered on the 11th day of November, 1933, in favor of the plaintiff, William Harris, Jr., against the defendant, Charles H. Harris, Jr.

On November 1, 1933, the plaintiff, William Harris, Jr., filed a petition in the Circuit Court of the United States for the District of Columbia, asking for an order compelling the defendant, Charles H. Harris, Jr., to pay to the plaintiff the sum of \$10,000, with interest thereon at the rate of 6% per annum, from the date of the filing of the petition until payment.

The defendant, Charles H. Harris, Jr., answered the petition, denying the plaintiff's claim, and asking for a judgment in his favor.

The plaintiff, William Harris, Jr., filed a reply to the answer, denying the defendant's denial, and asking for a judgment in his favor.

The defendant, Charles H. Harris, Jr., filed a motion to dismiss the petition, on the ground that the plaintiff, William Harris, Jr., had failed to state a claim upon which relief could be granted.

The plaintiff, William Harris, Jr., filed a reply to the motion, denying the defendant's motion, and asking for a judgment in his favor.

The defendant, Charles H. Harris, Jr., filed a motion to set aside the judgment, on the ground that the plaintiff, William Harris, Jr., had failed to state a claim upon which relief could be granted.

The plaintiff, William Harris, Jr., filed a reply to the motion, denying the defendant's motion, and asking for a judgment in his favor.

The defendant, Charles H. Harris, Jr., filed a motion to set aside the judgment, on the ground that the plaintiff, William Harris, Jr., had failed to state a claim upon which relief could be granted.

The plaintiff, William Harris, Jr., filed a reply to the motion, denying the defendant's motion, and asking for a judgment in his favor.

The defendant, Charles H. Harris, Jr., filed a motion to set aside the judgment, on the ground that the plaintiff, William Harris, Jr., had failed to state a claim upon which relief could be granted.

The plaintiff, William Harris, Jr., filed a reply to the motion, denying the defendant's motion, and asking for a judgment in his favor.

The defendant, Charles H. Harris, Jr., filed a motion to set aside the judgment, on the ground that the plaintiff, William Harris, Jr., had failed to state a claim upon which relief could be granted.

The plaintiff, William Harris, Jr., filed a reply to the motion, denying the defendant's motion, and asking for a judgment in his favor.

The defendant, Charles H. Harris, Jr., filed a motion to set aside the judgment, on the ground that the plaintiff, William Harris, Jr., had failed to state a claim upon which relief could be granted.

The plaintiff, William Harris, Jr., filed a reply to the motion, denying the defendant's motion, and asking for a judgment in his favor.

upon plaintiff remitting \$5,000, judgment in her favor was entered for \$7,500. On December 10, 1942, Steinhauer and Cohen filed their respective petitions and on January 23, 1943, Joseph Barbera filed ^{each} his petition, /praying for the award and enforcement of an attorney's lien under Chap. 13, Par. 14, Ill. Rev. Stats. The several petitions were based upon the several contracts of employment entered into by plaintiff. Plaintiff answered the petitions of Steinhauer and Cohen; Steinhauer answered the petitions of Barbera and Cohen; and Cohen answered the petition of Steinhauer and Barbera. Upon the issues thus made, the trial court heard testimony. February 4, 1943, the trial court entered the order appealed from. The court found therein that Steinhauer was not entitled to an attorney's lien, but allowed him \$687.50 for his services rendered; found that Cohen was entitled to an attorney's lien in the amount of \$850; found that Barbera was entitled to an attorney's lien in the amount of \$2,500; ordered the Clerk of the Circuit Court to pay over to the several attorneys the amounts awarded; and ordered the balance of \$3,462.50 paid to plaintiff.

After full consideration of the record in this cause, we are satisfied that the trial court made a just disposition of the issues presented by the petitions and that the order appealed from should be and it is hereby affirmed.

ORDER AFFIRMED.

BURKE, P.J. AND LUPF, J. CONCUR.

42883

NICHOLAS KORNENBERGER,

Plaintiff - Appellee,

v.

COCA COLA BOTTLING CO. OF CHICAGO,
INC., a corporation,

Defendant - Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

32-1A-519

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action with verdict and judgment for plaintiff in the sum of \$1,200.00. Defendant has appealed.

On July 8, 1940, about 4:45 P.M., plaintiff was driving his 1931 Ford sedan south on Western Avenue between 65th and 66th streets in the City of Chicago. His car collided with defendant's truck which was parked double in front of 6538 South Western Avenue, where a Coca Cola cooler was being delivered.

Plaintiff alleged his due care; the negligence of the defendant in parking double in violation of the Traffic Ordinance of the City of Chicago (Municipal Code, Chap. 27, Sec. 19, Sub-par. 12), and failure to warn other motorists of the double parking; and plaintiff's consequent injuries. Defendant denied the allegations.

Defendant contends that plaintiff was guilty of contributory negligence as a matter of law and that the court should have sustained its motion for judgment notwithstanding the verdict; and that the trial court committed error in instructing the jury.

Defendant offered no occurrence witness. There is no substantial dispute in the material evidence and, on the question of law thus presented, the test is whether reasonable men would arrive at but one conclusion on the evidence, that is, that plaintiff was guilty of contributory negligence. Plaintiff was following about 10 or 15 feet to the rear of a Buick automobile and was going between 20 and 25 miles an hour. Between 65th and 66th

WILLIAM F. BROWN

Plaintiff - Appellee

v.

GOODYEAR TIRE CO., INC.,
a corporation

Defendant - Appellant

NO. 10,000

This is a writ of habeas corpus in the nature of a writ of certiorari.

For plaintiff in the case of the writ of certiorari.

On July 1, 1934, the writ was granted.

The writ was granted on the basis of the following facts:

Plaintiff in the case of the writ of certiorari.

Plaintiff in the case of the writ of certiorari.

Plaintiff in the case of the writ of certiorari.

Plaintiff in the case of the writ of certiorari.

Plaintiff in the case of the writ of certiorari.

Plaintiff in the case of the writ of certiorari.

Plaintiff in the case of the writ of certiorari.

Plaintiff in the case of the writ of certiorari.

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Plaintiff in the case of the writ of certiorari.

Plaintiff in the case of the writ of certiorari.

Plaintiff in the case of the writ of certiorari.

Plaintiff in the case of the writ of certiorari.

Plaintiff in the case of the writ of certiorari.

streets, the latter forming with Western Avenue a "pretty bad" intersection, the Buick suddenly swerved to the left to avoid defendant's truck and plaintiff "looked to the left trying to follow him and I could not do that because there was too much traffic". He applied his emergency and foot-brakes and his car skidded 15 feet into the truck and at impact was going about 10 miles an hour. A witness for plaintiff said he saw plaintiff look to his left when the Buick swerved. Defendant's truck was painted yellow with a red trim and on the back thereof was painted a white trade-mark. The truck was 9 feet high at the rear and about 7½ feet wide. There is no question but that the truck, facing south, was parked double on the west side of Western Avenue, in violation of the Traffic Ordinance, for 3 or 5 minutes. The day was clear, the pavement dry and visibility good. The brakes on plaintiff's car were in good condition and plaintiff, before the accident, was looking ahead watching the Buick and did not see the truck until he was 15 feet north of it.

We agree with plaintiff that he was not bound to anticipate that defendant would be parked double in violation of the law. Defendant contends that the plaintiff was not keeping a proper outlook; and was following the Buick too closely at an unreasonable speed and with improper vision and, accordingly, was negligent. Both points are involved in the one question, we believe, because if plaintiff was following the Buick too closely, at an unreasonable speed with improper vision, he could not have kept a proper outlook. Plaintiff testified he was driving directly behind the Buick, looking straight ahead and did not see the truck until he was 15 feet north of it, when the Buick swerved to the left. The fact that he was but 10 to 15 feet behind the Buick may explain why he was unable to see the large and distinctly marked truck before that time.

However, the latter testified with assurance a "positive" and "certain"
 reaction, the Driver suddenly reacted as the truck was being
 truck and "instantly" looked to the left trying to bring the truck
 could not be that because there was no road there. The truck
 his emergency and foot-brake and the truck was in the air and
 truck and he landed on the ground. The truck was in the air and
 for "instantly" as he was falling from the truck. The truck was in
 back wheel. The truck was in the air and the truck was in the air
 this and on the back wheel the truck was in the air and the truck
 truck was 2 feet high at the time the truck was in the air and the truck
 no question but that the truck, back wheel, was in the air and the truck
 the west side of the road, in the air and the truck was in the air
 "instantly" for 2 or 3 feet. The truck was in the air and the truck
 and "instantly" as the truck was in the air and the truck was in the air
 condition and "instantly" as the truck was in the air and the truck was in the air
 watching the truck as it fell and the truck was in the air and the truck
 north of it.

A witness who testified that he saw the truck and the truck was in the air
 that "instantly" as the truck was in the air and the truck was in the air
 "instantly" as the truck was in the air and the truck was in the air
 and was "instantly" as the truck was in the air and the truck was in the air
 with "instantly" as the truck was in the air and the truck was in the air
 are involved in the case, as a witness, as a witness, as a witness, as a witness
 was following the truck too closely, as a witness, as a witness, as a witness, as a witness
 "instantly" as the truck was in the air and the truck was in the air
 testified he was driving directly behind the truck and the truck was in the air
 ahead and did not see the truck until he was 15 feet north of it.
 when the truck was in the air. The truck was in the air and the truck was in the air
 to 15 feet behind the truck and explain why he was unable to see
 the large and distinctly marked truck before that time.

The test whether plaintiff was prudent under the circumstances is whether he had his car under such control as a reasonably prudent man would have had with due regard to all of the circumstances hereinabove related. It appears from his testimony that he acted prudently once the danger appeared, for he saw the truck, saw he could not follow the Buick and applied his brakes. His negligence, if any, however, did not arise at the time of the impact but as he followed, if he did follow, driving too close or at an unreasonable speed behind the Buick. Such conduct would be negligence whether the accident happened or not. The fact that his car skidded into the truck at 10 miles an hour, although the pavement was dry, leaves no other inference, we believe, except that under the circumstances plaintiff was driving too fast or following the Buick too closely. (Jirkowsky, Jr. et al. v. Elfman, et al., 323 Ill. App. 282.) In either event he was negligent. (Chap. 95 $\frac{1}{2}$, Par. 158, Ill. Rev. Stats.) Plaintiff argues that the case and Statute pertain only to the relation to a vehicle and another following it and are not, therefore, applicable to the instant case. We believe that what we have said with reference to the negligence preceding the accident is sufficient answer to this argument. We believe that reasonable men would come to but one conclusion under the circumstances in this case and that is that plaintiff was negligent in driving too close to the Buick which he was following. This conclusion is warranted by authority of our courts as well as courts of foreign jurisdictions. Cooney v. F. Landon Cartage Co., 308 Ill. App. 444; Johnson v. Kushler, 269 Ill. App. 553; Roberts v. Mason, 6 La. Ct. of Appeals 703; Cronin v. Shell Oil Co., 112 Pac. (2nd) 824.

In Geisen v. Luce, 185 Minn. 479, a case somewhat similar to the one at bar, it was said that under the circumstances there the accident would have happened just the same had the standing car been moving slowly. The same observation is pertinent in this

4

case. The truck though standing in violation of the law, simply furnished a condition which translated plaintiff's negligence into an accident. Plaintiff relies principally upon Miller v. Burch, 257 Ill. App. 387. Suffice to say the plaintiff there was not the driver of a vehicle following closely behind another.

We need pass on no other point. We are of the opinion that plaintiff was guilty of negligence as a matter of law; that his negligence contributed to cause the accident and the judgment, accordingly, must be and hereby is reversed.

JUDGMENT REVERSED.

BURKE, P.J. AND LUKE, J. CONCUR.

case. The first through standing in violation of the law. (page 1)
furnished a condition which rendered it impossible to maintain the
an accident. Plaintiff relies substantially upon Willie V. Smith.
327 Ill. App. 387. There is no authority there for the
driver of a vehicle following closely behind another.
It now seems to appear that the law of the state
that plaintiff was guilty of negligence. It is not of the law that
his negligence contributed to the accident and the result.
Accordingly, such as the record is reversed.

WILLIE V. SMITH, 327 ILL. APP. 387.

1. Automobiles and Motor Vehicles, §87.1* -- one motorist as not bound to anticipate another motorist's violation of traffic law. Plaintiff, whose automobile rear-end was in collision with defendant's truck, was not bound to anticipate that defendant would be parked double in violation of law. (Chicago Municipal Code, ch. 27, §19, subpar. 12.)

2. Automobiles and Motor Vehicles, §87* -- test of contributory negligence on part of motorist whose automobile was in rear-end collision with truck. Test whether plaintiff, whose automobile was, ~~in xxxxxxxxxx in~~ in daytime, in rear-end collision with truck, was prudent, is whether he had his car under such control as reasonably prudent man would have had with due regard to all of circumstances of case.

3. Automobiles and Motor Vehicles, §138* -- when plaintiff, whose automobile was in rear-end collision with defendant's truck, was guilty of contributory negligence as matter of law. In action for personal injuries, sustained by plaintiff when, in daytime, his automobile was in rear-end collision with defendant's truck, which in violation of city ordinance, was parked double but which was thus parked for

~~Error to the~~ Municipal Court of Chicago;
~~Appeal from the~~ Superior Court of Cook county;
Circuit Court of county;
County Court of county;
City Court of

the Hon. M. L. McKinley, Judge, presiding.

~~Affirmed~~ Judgment reversed.
~~Reversed~~
~~Reversed and remanded with directions.~~
Heard in the third division, first district, this court at the October term, 1943; opinion filed December 15, 1944. rehearing denied

James A. Dooley,

for appellants;

for plaintiffs in error;

Barney L. Hollowick,

for appellees.

for defendants in error.

... of making answer, held that, under
... plaintiff was negligent, as mat-
... in driving too close to automobile
... which he was following, and ^{that} this neg-
... contributed to cause of accident.

42598

HALLIE E. MCCOWAN, PHILIP BAIM,
Assignee,

Plaintiffs - Appellees,

v.

DON C. MCCOWAN, CABOT FOUNDATION,
INC., a corporation, and T. FRANKLIN
JAMES,

Defendants - Appellees,

save

CABOT FOUNDATION, INC., a corporation,

Defendant - Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

32-1-A-320

MR. JUSTICE LUPE DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment and decree of the
Superior Court of Cook County.

On December 16, 1938, the plaintiff, Hallie E. McGowan,
filed a complaint for separate maintenance against her husband,
Don C. McGowan, naming Cabot Foundation, Inc., Continental Illinois
National Bank and Trust Company of Chicago, and Chicago Title and
Trust Company as Trustee, defendants.

Defendants answered and McGowan filed a counterclaim
seeking a divorce, alleging desertion. Plaintiff thereafter filed
a petition for temporary alimony and solicitor's fees. The matter
was referred to Lionel G. Thorsness, a special commissioner, and
the commissioner was ordered to hear evidence and report particularly
upon the interest of McGowan in Cabot Foundation, Inc. After
taking the evidence the Commissioner filed his report wherein he
made lengthy findings of facts and concluded that Don C. McGowan
owned and controlled Cabot Foundation, Inc., and that he was
financially able and had sufficient property and income to provide
for his wife and to pay solicitor's fees. The chancellor approved

123456

WILLIAM M. HOBBS, JR., Plaintiff,

vs.

JOHN C. HOBBS, Defendant,
and T. HOBBS, Defendant.

Plaintiff - Appellee,

vs.

SACRED FOUNDATION, INC., a corporation,
Defendant - Appellant.

THE COURT HAS REVIEWED THE RECORD IN THIS CASE.

THIS IS AN APPEAL FROM A JUDGMENT AND DECREE OF THE

SUPERIOR COURT OF DEKALB COUNTY.

ON DECEMBER 12, 1930, THE PLAINTIFF, WILLIAM M. HOBBS,

FILED A COMPLAINT FOR REPERCUSSIVE MAINTENANCE AGAINST HIS WIFE,

JOHN C. HOBBS, RESIDING 1234 DEKALB COUNTY, ILLINOIS.

NATIONAL BANK AND TRUST COMPANY OF CHICAGO, AND CHICAGO TITLE AND

TRUST COMPANY AS TRUSTEES, DEFENDANTS.

DEFENDANTS ANSWERED AND HOBBS FILED A COUNTERCLAIM

SEEKING A DIVORCE, ALLEGING ADULTERY. PLAINTIFF THEREAFTER FILED

A PETITION FOR TEMPORARY ALIMONY AND COLLECTOR'S FEES. THE MATTER

WAS REFERRED TO HONORABLE J. THOMAS, A JUDICIAL COMMISSIONER, AND

THE COMMISSIONER WAS ORDERED TO HEAR EVIDENCE AND REPORT PARTICULARLY

UPON THE INTEREST OF HOBBS IN DEKALB FOUNDATION, INC. AFTER

HEARING THE EVIDENCE THE COMMISSIONER FILED HIS REPORT WHEREIN HE

MADE LENGTHY FINDINGS OF FACT AND CONCLUDED THAT DON C. HOBBS

OWNED AND CONTROLLED DEKALB FOUNDATION, INC., AND THAT HE WAS

FINANCIALY SOLV AND HAD SUFFICIENT PROPERTY AND INCOME TO PROVIDE

FOR HIS WIFE AND TO PAY COLLECTOR'S FEES. THE COMMISSIONER APPROVED

3241A.520

the report of the commissioner and ordered defendant McCowan to pay the plaintiff the sum of \$20 per week beginning on March 4, 1940 as and for temporary alimony, and in addition thereto \$1,500 temporary solicitor's fees, instant, and to pay the costs of the commissioner in taking proof and rendering his report, in the sum of \$280. From this order defendant McCowan appealed. On February 26, 1941, the order appealed from was affirmed, but the amount of commissioner's fees was reduced to \$56. (McCowan v. McCowan, 308 Ill. App. 669.) While the appeal was pending, the issues on the bill for separate maintenance and the amended counter-complaint for divorce came on for hearing and on July 3, 1940, a decree was entered dismissing plaintiff's complaint and defendant's counter-claim for want of equity, and dismissing the cause, "Save and except for the matters contained in and relative to the order of this court entered on March 5, 1940 and pertaining to the questions of alimony pendente lite, temporary solicitor's fees, and special commissioner's report, which are hereby transferred to said judge for his action, if any." (Referring to John C. Lowe.) (italics ours.) No appeal was taken from this order.

On October 2, 1940, plaintiff procured an order for the allowance of \$500 for the purpose of defending the appeal allowing alimony and solicitor's fees. On April 17, 1941 an order was entered finding the amount due the plaintiff from the defendant, by virtue of the order of March 5, 1940, and subsequent orders, to be \$1,930, and decreeing that the plaintiff have execution therefor. At the time of the entry of said order the court fixed the fee of the commissioner as per the order of the Appellate Court at the sum of \$56. Don C. McCowan was also ordered to pay an additional sum of \$500 in connection with the appeal, and from this order defendant again appealed, contending that the order of March 4, 1940 providing for

the report of the commissioner and ordered defendant to pay the plaintiff the sum of \$50 per week beginning on March 4, 1940 and for temporary alimony, and in addition thereon \$1,500 temporary solicitor's fees, interest, and to pay the costs of the commissioner in taking proof and rendering the report, in the sum of \$200. From this order defendant appealed. On February 23, 1941, the order appealed from was affirmed, but the amount of the commissioner's fees was reduced to \$100. (McDonough v. McDonough, 308 Ill. App. 539.) While the appeal was pending, the issue of the bill for separate maintenance and the pending counter-claim for divorce came on for hearing and on July 1, 1940, a decree was entered dissolving plaintiff's complaint of defendant's counter-claim for want of equity, and dissolving the marriage, "with and without the parties remaining in and relative to the order of this court entered on March 5, 1940 and continuing in the jurisdiction of alimony payments, and temporary solicitor's fees, and appeal of defendant's appeal, which are hereby transferred to said order for the appeal, it is so." (Referring to John G. Lowe.) (Lowe v. Lowe.) No appeal was taken from this order.

On October 3, 1940, plaintiff removed an order for the allowance of \$500 for the purpose of obtaining the appeal allowing alimony and solicitor's fees. On April 17, 1941 an order was entered finding the amount due the plaintiff from the defendant, by virtue of the order of March 5, 1940, and subsequent orders, to be \$1,950, and decreeing that the plaintiff have execution therefor. At the time of the entry of said order the court fixed the fee of the commissioner as per the order of the appellate court at the sum of \$50. McDonough was also ordered to pay an additional sum of \$500 in connection with the appeal, and from this order defendant again appealed, contending that the order of March 4, 1940 providing for

temporary alimony and solicitor's fees in effect was a nullity by reason of the final decree entered July 3, 1940 which disposed of both the complaint and counterclaim for want of equity. This court, on this appeal, held that the allowances for alimony and attorney's fees were vested rights, and affirmed the order of April 17, 1941. (McCowan v. McCowan, 313 Ill. App. 654.)

While the second appeal was pending, the plaintiff procured an order for the sum of \$500 to be paid by the defendant McCowan for attorney's fees and costs in defending said appeal, from which order defendant prosecuted his third appeal. And on motion of plaintiff this court entered an order of affirmance on said appeal on March 30, 1942. On motion of plaintiff, the chancellor allowed a further fee in defending the third appeal, in the sum of \$210.

The record shows that all plaintiff received on said orders was the sum of \$500, for which she has given credit to defendant on the amount due her from him.

Plaintiff began further proceedings in this cause in the nature of garnishment against Dr. T. Franklin James and others to enforce the collection of the amounts due her. Two judgments were entered in said garnishment proceedings in the sum of \$400 each against Dr. T. Franklin James. Motions were made by the garnishee to set aside said judgments and those motions were pending at the time of the entry of the decree involved in this appeal. The evidence discloses that on or about December 22, 1939, the defendant McCowan and Dr. T. Franklin James (garnishee) entered into an agreement wherein the defendant McCowan sold his medical practice and equipment in Chicago to Dr. James for the sum of \$18,000, payable \$1,000 on the execution of the agreement and the balance at the rate of \$400 or more on the first of each and every month commencing February 1, 1940, all payments to be made to the Continental Illinois National Bank and Trust Company of Chicago, "for the credit of Cabot Foundation, Inc., to which corporation the vendor herein does hereby give, grant and donate said purchase price for the purpose of effectuating and

temporary attorney and solicitor's fees in effect was a nullity by reason of the final decree entered July 3, 1940 which disposed of

both the complaint and counterclaim for want of equity. This

court, on this appeal, held that the allowances for attorney and attorney's fees were vested rights, and affirmed the order of April

17, 1941. (McGowan v. McGowan, 318 Ill. App. 3d.)

While the second appeal was pending, the plaintiff procured

an order for the sum of \$500 to be paid by the defendant McGowan

for attorney's fees and costs in defending said appeal, from which

order defendant procured his full reversal, and on motion of

plaintiff this court entered an order of affirmance on said appeal

on March 30, 1942. On motion of plaintiff, an execution allowed

a further fee in defending the first appeal, in the sum of \$100.

The record shows that all plaintiff received on said

orders was the sum of \$600, for which she has given credit to

defendant on the amount due her from him.

Plaintiff began further proceedings in this cause in the

nature of garnishment against Dr. T. Franklin James and others to

enforce the collection of the amounts due her. Two judgments were

entered in said garnishment proceedings in the sum of \$400 each

against Dr. T. Franklin James. Motions were made by the garnishee to

set aside said judgments and those motions were pending at the time

of the entry of the orders involved in this appeal. The evidence

discloses that on or about December 22, 1939, the defendant McGowan

and Dr. T. Franklin James (garnishee) entered into an agreement

wherein the defendant McGowan sold his medical practice and equipment

in Chicago to Dr. James for the sum of \$12,000, payable \$1,000 on

the execution of the agreement and the balance at the rate of \$400

or more on the first of each and every month commencing February 1,

1940, all payments to be made to the Continental Illinois National

Bank and Trust Company of Chicago, "for the credit of Cabot Foundation,

Inc., to which corporation the vendor herein does hereby give, grant

accomplishing its corporate purposes". On May 21, 1942, the plaintiff filed her petition in the Superior Court naming all of the then parties in interest as respondents or defendants, for the purpose of determining the rights of the parties and disposing of the litigation. This petition named as defendants or respondents the following: Don C. McCowan, Cabot Foundation, Inc., Continental Illinois National Bank and Trust Company, and T. Franklin James, and detailed the various orders and the history of the litigation.

Answers were filed to said petition by the defendants and also by Philip Baim as assignee, who had secured an order permitting him to intervene in said proceedings. Baim alleged in his answer that he was an assignee of the judgment recovered by plaintiff against defendant McCowan and that he had filed his assignment of record. Defendant McCowan alleged that the plaintiff was not entitled to any relief as she had assigned the judgment, and, for the further reason that her bill of complaint had been dismissed for want of equity. In Dr. James's answer and counter-claim he set up the contract between himself and defendant McCowan, also showing the status of the payments made thereunder, and requested that the two judgments entered in said garnishment proceeding against him be set aside, and that the court settle the rights of the parties to the contract in the money which he owed thereunder, and sought the protection of the court in reference to future payments under said contract.

The Cabot Foundation in its answer alleged its corporate purposes, and alleged that the complaint and counter-complaint of the complainant and the defendant McCowan were dismissed for want of equity, and that the plaintiff had no interest in said judgments or orders because of her assignment to Philip Baim, and prayed that her petition be dismissed and her prayer therein be denied.

Issues having been joined, the matter was referred to Henry L. Burman, one of the masters of the Superior court. The order of reference provided that the master was, "to take the evidence

accomplishing its corporate purposes. On May 21, 1904, the plaintiff
filed her petition in the Superior Court naming all of the above
parties as respondents or defendants. The purpose of
determining the rights of the parties and disposing of the litigation.
This petition named as defendants the following:
Don C. McGowan, General Superintendent, and the American
Bank and Trust Company, and the plaintiff, and asked the
various orders and the filing of the petition.
Answers were filed to this petition by the defendants
and also by Philip L. James, who had been named as a party
petitioning him to intervene in said proceedings. This filing in his
answer that he was an assignee of the judgment assigned to plaintiff
against defendant McGowan and that he had filed his assignment of
record. Defendant McGowan alleged that the plaintiff was not entitled
to any relief as she had assigned the judgment, and the plaintiff
replied that her bill of complaint was based on the fact of
equity. In Mr. James's answer and counter-claim he set up the
contract between himself and defendant McGowan, also showing the status
of the payments made thereunder, and requested that the two judgments
entered in said proceedings be reversed against him as set aside, and
that the court settle the rights of the parties to the contract in
the money which he owed thereunder, and except the protection of the
court in reference to future payments under said contract.
The Great Northern in its answer alleged the corporate
purposes, and alleged that the complaint and counter-claims of
the complainant and the defendant McGowan were dismissed for want of
equity, and that the plaintiff had no interest in said judgments or
orders because of her assignment to Philip L. James, and prayed that her
petition be dismissed and her prayer therein be denied.
James having been joined, the matter was referred to
Henry L. Hurman, one of the masters of the Superior Court. The
order of reference provided that the master was "to take the evidence

of said issues as presented by the parties and report the same to the court together with his conclusions as to the law and fact thereon." After hearing of the evidence, the master filed his report wherein he found that the plaintiff had assigned her interest in the judgment to Philip Baim; that the sum of \$500 which had been paid to the plaintiff had been used to pay the special commissioner's fees of \$56; and that the balance of \$444 had been applied on account of the \$1,930 due plaintiff, leaving a balance due Philip Baim as assignee of \$1,486 plus 5 per cent interest from April 17, 1941. He further found as to the various allowances which had been made as hereinabove set forth, including the garnishment judgments which were against Dr. James, and made further findings as to the motions of Dr. James to vacate said judgments, and concluded, "After considering the evidence and the status of the record, and after examining the contract entered into by Dr. James and the defendant McCowan, that the balance of moneys due under said contract in the sum of \$4,400 is really the assets of Dr. Don C. McCowan." The finding of the master confirmed the finding of the special commissioner Thorenness as to Cabot Foundation, Inc. The master recommended an order or decree be entered directing Dr. James to make payment on the aforesaid contract to Philip Baim, assignee, until the sum of \$1,486 plus interest from April 17, 1941 had been paid; and that thereafter he make payment to Hallie E. McCowan until the sum of \$500 plus interest from April 17, 1941 should be paid, and until the further sum of \$500 plus interest from July 16, 1941 should be paid to plaintiff, and also until the further sum of \$210 plus interest from August 7, 1942 should be paid. The master attached his certificate for fees calling for the sum of \$114.25.

Objections which stood as exceptions to the master's report came on for hearing before the chancellor, and on October 23, 1941 the master's report was approved and the final decree and order herein appealed from was entered. The decree provided after fixing

the master's fees that Dr. James was to pay to Philip Baim the sum of \$1,595.40, being principal and interest calculated as aforesaid; that he was to pay to Hallie E. McCowan \$1,282.71 in full of the amount found to be due to her by the master, being principal and interest as aforesaid; and that all costs be taxed against the defendant McCowan; and that the balance of the \$4,400 after payment as aforesaid to Philip E. Baim and Hallie E. McCowan, and costs, be paid by Dr. James to Don C. McCowan, defendant; and that the two judgments entered in the garnishment proceedings against Dr. James of \$400 each, "be and they are hereby merged in this decree, and the payment of the amounts called for by this decree by said T. Franklin James, shall satisfy the said judgments fully and completely, and, further, that the payment of the amounts called for by this decree shall satisfy the obligations of the said T. Franklin James to the said Don C. McCowan under the said contract between the parties, of December 22, 1939, as referred to in the master's report, and as set out in the pleadings herein."

The bulk of the amount which had accumulated was for solicitor's fees in defending three previous appeals.

Defendant Don C. McCowan contends that the Superior Court of Cook County was without jurisdiction to enter the judgment and decree appealed from, and that the contract between Dr. James and McCowan was made for the benefit of Cabot Foundation, Inc., a corporation, and that the right to the purchase money thereunder vested in Cabot Foundation, Inc. upon the consummation of the contract.

On March 5, 1940 the special commissioner found that Cabot Foundation, Inc. was owned and controlled by defendant McCowan, and the same finding was made by Master Burman and approved by the chancellor October 23, 1942. We think this finding is amply supported by the evidence in this record. It is clearly shown that Cabot Foundation, Inc., a corporation, was organized and carried on by Dr. McCowan as a subterfuge to cover up the fact that he was the real owner of the

the master's fees that Dr. James was to pay to Philip were the sum of \$1,500.00, being principal and interest calculated as follows; that he was to pay to Philip F. McGowan \$1,500.00 in full of the amount found to be due to her by the master, being principal and interest as aforesaid; and that all costs be taxed against the defendant McGowan; and that the balance of the \$1,500.00 shall be paid to Philip F. McGowan and Philip F. McGowan, and that the judgment entered James to Don G. McGowan, defendant; and that the judgment entered in the defendant's proceedings against Philip F. McGowan, be set aside and they are hereby ordered in this case, and the costs of the amounts claimed for by this decree of Philip F. McGowan, shall satisfy the said judgment fully and completely; and, further, that the payment of the amounts claimed for by this decree shall satisfy the obligations of the said Philip F. McGowan to the said Don G. McGowan under the said contract between the parties, of December 22, 1933, as referred to in the master's report, and as set out in the pleading hereto.

The bulk of the amount which had accumulated was for collector's fees in defending these various appeals.

Defendant Don G. McGowan contends that the Circuit Court of Cook County was without jurisdiction to enter the judgment and decree appealed from, and that the court of between Dr. James and McGowan was made for the benefit of Labor Foundation, Inc., a corporation, and that the right to the corporate assets thereunder vested in Labor Foundation, Inc. upon the incorporation of the contract.

On March 6, 1940 the special commissioner found that Labor Foundation, Inc. was owned and controlled by defendant McGowan, and the same finding was made by Master Gurnea and approved by the chancellor October 22, 1942. He took this finding as fully supported by the evidence in this record. It is clearly shown that Labor Foundation, Inc., a corporation, was organized and carried on by Dr. McGowan as a subterfuge to cover up the fact that he was the real owner of the

assets of said corporation, and that he had made a pretended transfer of his interest to said corporation in order to evade and delay plaintiff and her attorney in the collection of the amounts allowed by the court herein. We are of the opinion, Dr. McGowan was always the real owner of the assets of Cabot Foundation, Inc., and agree with the commissioner, the master, and the chancellor on this question.

Defendant's next contention is that the Superior Court was without jurisdiction to enter the judgment or decree appealed from because the orders had not been reduced to judgment and no executions had been issued and returned wholly or partly unsatisfied and, further, that plaintiff could not in these proceedings avail herself of Rule 35½ of the Superior Court of Cook County. The petition in this proceeding was not a proceeding under Rule 35½ but was filed under the general equity power of the court to enforce orders entered in divorce cases. In effect, the petition was for an order on defendant, Dr. McGowan, to pay as provided in the orders theretofore entered. Enforcement of decrees in divorce cases may in the same proceedings take various forms such as contempt, receivership, injunction proceedings, etc. None of these proceedings requires the issuance of an execution, and the aggrieved party may adopt any legal or equitable power of the court to procure the enforcement of its order for the payment of money in divorce cases. From this viewpoint the plaintiff and plaintiff's assignee had the right to invoke the aid of the court to determine the fact that Dr. McGowan had or was possessed of certain property in the name of Cabot Foundation, Inc., a corporation, and, having so determined, order it applied to the payment of the moneys directed by the court, to be paid by Dr. McGowan.

As to Cabot Foundation, Inc., it had a full and fair hearing before the court and, as heretofore held, its assets were in reality the assets of defendant McGowan.

From the order appealed from it is apparent that the court acted under its general chancery powers, and it is also plain that the petition was not filed under Chapter 110, section 197, Ill. Rev. Stats. 1941 as contended by defendant. It is fundamental that when a court of equity has jurisdiction of a case for one purpose it will retain such jurisdiction for all related purposes so as to do complete justice between the parties. It may establish purely legal rights and grant legal remedies in the same proceeding. (Martin v. Strubel, 367 Ill. 21.)

It is urged that defendant Cabot Foundation, Inc., was deprived of its property without due process of law in that it was deprived of a right of trial by jury, and that the proceeding was a summary one and was in violation of sections 2 and 5 of Article II of the Illinois constitution and the Fourteenth Amendment, section 1, of the Constitution of the United States. The purpose of the due process clause in the constitution of Illinois is to protect every citizen in his personal and property rights against arbitrary action of any person or authority. (R. G. Lydy, Inc. v. The City of Chicago, 356 Ill. 230.) The essential elements of due process of law are notice to the defendant and the opportunity to be heard in the protection and enforcement of his rights before a court of competent jurisdiction in an orderly proceeding adapted to the nature of the case. (Sheaff v. Spindler, 339 Ill. 540.) Each person is entitled to notice and shall have an opportunity to be heard and to enforce and protect his rights before a court having power to hear and determine the cause. This constitutes due process of law. (People v. Joseph Niesman, 356 Ill. 322.) The clause implies administration of equal laws, according to established rules not violative of the fundamental principles of private rights, by a competent tribunal having jurisdiction of the case and the proceedings, upon which notice and hearing and due process is secured by laws operating on all alike and which do not subject individuals to arbitrary exercise of govern-

From the order appealed from it is apparent that the court acted under its general supervisory powers, and it is also plain that the petition was not filed under Chapter 110, Section 197, Ill. Rev. Stat., 1941 as amended by Act No. 114, 1941, but that when a court of review has jurisdiction of a case for any purpose it will retain such jurisdiction for all related purposes as to its complete justice between the parties. It may establish purely legal rights and grant legal remedies in the same proceeding. (Mullin v. Campbell, 352 Ill. 51.)

It is urged that respondent's petition was denied, that he was deprived of his property without due process of law in that he was deprived of a right of trial by jury, and that the proceeding was a summary one and was in violation of sections 1 and 2 of Article II of the Illinois Constitution and the corresponding Amendment, section 1, of the Constitution of the United States. The purpose of the due process clause in the constitution of Illinois is to protect every citizen in his person and property against arbitrary action of any person or authority. (R. E. Jones, Inc. v. The City of Chicago, 356 Ill. 230.) The essential elements of the exercise of law are notice to the defendant and the opportunity to be heard in the protection and enforcement of his rights before a court of competent jurisdiction in an orderly proceeding subject to the nature of the case. (Sheff v. Hunsicker, 359 Ill. 643.) Each person is entitled to notice and shall have an opportunity to be heard and to enforce and protect his rights before a court having power to hear and determine the cause. This constitutes due process of law. (People v. Joseph Miesman, 356 Ill. 232.) The clause involves administration of equal laws, according to established rules not violative of the fundamental principles of private rights, by a competent tribunal having jurisdiction of the case and the proceedings, upon which notice and hearing and due process is secured by laws operating on all alike and which do not subject individuals to arbitrary exercise of govern-

mental powers. (Marallia v. City of Chicago, 349 Ill. 422.)

The record is barren of any request to have any issue in this matter tried by a jury, and the benefit of the provision may be waived, and it was waived by failure of the defendant to raise any objection in the court below. Having participated in the proceeding and failing to demand trial by jury, defendants cannot here raise the question. (Marshall Field & Co. v. Industrial Comm., 305 Ill. 134.)

It is uniformly held that in the absence of express statutory or constitutional provisions a jury is no part of the chancery system. (21 C. J. 585.) In this State the guaranty of a right to a jury trial does not extend to cases of equity jurisdiction. The provision of the constitution of 1870 prescribing the right to a trial by jury does not extend to cases in equity but is confined to cases at law.

Flaherty v. McCormick, et al., 113 Ill. 538; Hescock v. Hoemer, 109 Ill. 245; Maynard v. Richards, 186 Ill. 466.) We therefore conclude that there was no violation of any rights of Cabot Foundation, Inc., under either the State or Federal constitution.

It is next urged that by virtue of assignment to Main plaintiff had no interest in the judgment. However, the record shows that she did have an interest in the proceeding, as there is due and owing to her in accordance with the findings of the decree, the sum of \$1,282.71. Could counsel for defendant so complain when Main, who has received an assignment for certain moneys from the plaintiff, which were due and owing by the defendant or defendants herein, is not now complaining? What difference does it make to the defendants here to whom the money is to be paid? Their concern should be that they should not be compelled to pay it twice. Under and by virtue of the decree entered herein could there be any question with reference to

mental powers. (Karpalis v. City of Chicago, 349 Ill. 482.)

The record is barren of any request to have any law in this matter tried by a jury, and the result of the provision may be waived, and it was waived by failure of the defendant to raise

any objection in the court below. Having participated in the proceeding and failing to demand trial by jury, defendant cannot now raise the

question. (Karpalis v. City of Chicago, 349 Ill. 482.)

It is uniformly held that in the absence of express authority or

constitutional provision a jury is not to be used in the summary system.

(21 C. 2. 385.) In this case the question of a trial by jury trial

does not extend to cases of summary jurisdiction. The provision of

the constitution of 1870 prescribing the right to a trial by jury does

not extend to cases in equity but is confined to cases of law.

Flannery v. McGovern, et al., 115 Ill. 334; Lessor v. Hennrich, 108

Ill. 245; Hennrich v. Lessor, 108 Ill. 422.) A further conclusion

that there was no violation of any right of legal jurisdiction, law,

under either the State or Federal constitution.

It is next urged that by virtue of assignment to claim

plaintiff had no interest in the judgment. However, the record shows

that she did have an interest in the proceeding, as there is an and

owing to her in accordance with the findings of the court, the sum

of \$1,288.71. Could counsel for defendant so complain when claim,

who has received no assignment for certain money from the plaintiff,

which was due and owing by the defendant or defendant's estate, is not

now complaining? What difference does it make to the defendant here

to whom the money is to be paid? Their concern should be that they

should not be compelled to pay it twice. Under and by virtue of the

decree entered herein could there be any question with reference to

the application of the money or payment that was owed by the defendants herein? Plaintiff had a right to assign her judgment of money due her, either to Balm or anyone she chose, and Balm had a right under the act to come in and intervene, and there is no dispute on that point. If there were any defense that either of the defendants had against the assignment of the judgment or the amount of money that was due they could have urged the same as against Balm, because he took no greater right than the plaintiff had in this case. There being no complaint on that score, how was the defendant damaged thereby? Certainly we cannot see that the assignment affected them in any way. The chancellor, in his decretal order, amply protected the defendants herein so that they would not be compelled to pay again the amount due.

We feel, after a careful examination of the record, the testimony offered before the special commissioner and master of the Superior Court, and the decretal order appealed from, that the only conclusion we can come to is that the defendants had a full and fair hearing, and that the decree and order appealed from were just and correct.

Other points raised by defendants have been settled on former appeals.

It is therefore ordered that the decree entered on October 23, 1942 be, and the same is hereby, affirmed.

DECREE AFFIRMED.

BURKE, P.J., AND KILEY, J. CONCUR.

the application of the duty of payment that will arise in the
 defendant's hands? I think that a right to receive the money
 money due him, either in full or upon the money, and that it is
 right under the law to pay it to him, and that it is his right
 on this point. It there is any reason that might be given
 had against the assignment of the judgment on the ground of equity
 that was due that would have been the same as saying that, because
 he took as greater right than the plaintiff had in the money, that
 being no complaint on that point, and that the fact that he took it
 definitely we cannot say that the assignment affected him in any way.
 The question, in the defendant's hands, is whether or not the
 plaintiff is to be paid the money and is entitled to the money in full.
 as fact, after a careful examination of the record, the
 testimony offered before the jury, and the evidence in the
 plaintiff's favor, and the finding of the jury, that the
 conclusion we now come to is that the defendant is to be paid
 nothing, and that the money due the plaintiff is to be paid
 to him.

Other points raised by defendant were not argued.

former appeals.

It is therefore ordered that the decree entered in

October 25, 1946 be, and the same is hereby, affirmed.

THOMAS L. JONES

CLERK, U.S. DISTRICT COURT, S.D. CALIF.

42623

ELIAS HACKNER,

Appellant,

v.

ALLEN VAN WYCK, et al.,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

32-111-521 16

MR. JUSTICE LUPE DELIVERED THE OPINION OF THE COURT.

The plaintiff filed his complaint alleging that he is a stockholder of the Illinois Iowa Power Company, a corporation, one of the defendants herein, and as such instituted this suit for and on behalf of the corporation to recover from the other defendants, who were or had been its officers and directors, certain funds which, it was alleged, said defendants had caused the corporation illegally and unlawfully to pay out and expend. The defendants filed their motion to dismiss the complaint on several grounds, one of which was that the complaint did not state a cause of action. Subsequently, the plaintiff filed a supplemental amendment to his complaint and later an amendment thereto. The motion of defendants to dismiss was allowed to stand to the complaint as supplemented and amended, and upon a hearing of said motion to dismiss the court entered a decree sustaining the motion and dismissed plaintiff's complaint as so supplemented and amended. Plaintiff, thereupon, took an appeal to the Supreme Court, which transferred the appeal to this court. (381 Ill. 622.)

The complaint alleges that plaintiff had been an original stockholder of the Illinois Iowa Power Company since January 19, 1937, and is still the owner of said stock; that the corporate defendant was organized under the laws of the State of Illinois; that the individual defendants were its officers and directors, as follows: Allen Van Wyck, President, F. G. Sutherland, Secretary,

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H. E. Johnson, Treasurer, G. P. Dorschel, Director, A. C. Hall, Director, H. L. Hanley, Director, E. S. Hight, Director, J. H. Keys, Director, C. A. Leland, Director, and A. P. Titus, Director; that on December 3, 1940, an indictment was returned by the Grand Jurors of the United States of America in the District Court of the United States within the Southern Division of the Southern District of Illinois against Illinois Iowa Power Company, the corporate defendant herein, against the Missouri Power & Light Company, not a defendant in this cause, and against Henry L. Hanley, James D. Mortimer and Aura C. Hall, who are defendants in this cause; that said indictment charged, among other things, that the said Illinois Iowa Power Company, James D. Mortimer, Henry L. Hanley and Aura C. Hall, as officers and directors of the Illinois Iowa Power Company, entered into a conspiracy to commit offenses against the United States of America in unlawfully and willfully making contributions as defined in the Public Holding Company Act of 1935 in connection with the candidacies, nominations, elections and appointments of persons for and to the offices and positions in the government of the State of Illinois, political subdivisions, agencies, authorities and instrumentalities of the State of Illinois, political parties and committees and agencies of political parties, by the use of the United States mails, means and instrumentalities of Interstate Commerce, and otherwise in violation of Section 12 (a) of Public Utility Holding Company Act 1935; and that the defendants in said indictment procured moneys from the corporation by fraudulent devices (citing instances of same) and using the money so obtained to make said contributions.

The complaint further alleged that on October 22, 1941, the Illinois Iowa Power Company, through its corporate officers, filed a plea of guilty to said indictment and by arrangements with the United States Attorney, the criminal prosecution was nolle prossed against the individual defendants, Henry L. Hanley, James D. Mortimer and Aura C. Hall; the Illinois Iowa Power Company was adjudged

guilty of the offenses enumerated in said indictment and was directed to pay a fine of \$5000 and costs, which more fully appeared in the copy of the plea and in the copy of the order adjudging said Illinois Iowa Power Company guilty, which said copies were attached as exhibits to said complaint. The complaint further stated that the defendants who are officers of said Illinois Iowa Power Company should account to said corporation for all the funds which they illegally distributed in the manner and form as charged in said indictment; that the entry of the plea of guilty by said corporation and the dismissal of the prosecution against the individual defendants in said indictment was to the damage and injury of plaintiff and to other stockholders of said corporation similarly situated; that a corporation can act and speak only through its officers and directors, and the crimes that were committed to which the corporate officers had confessed on behalf of said corporation were not actually committed by the corporation but by the individual defendants named in the complaint who were and are its officers and directors; that they acted on its behalf and should be called upon to pay the fine imposed upon said corporation. The complaint further alleged that plaintiff had made no demand on the Board of Directors or on the officers of said corporation to take action upon said matters for the reason that any such demand would be idle, futile and nugatory.

The complaint prays a full discovery of all the facts and circumstances and things alleged in the indictment referred to in the complaint; that the individual defendants account for all moneys received and disbursed; that they account for all moneys paid out in defense of the prosecution of said indictment; and that the individual defendants be held liable for all such moneys received and disbursed and paid out in said defense.

After the filing of the complaint the plaintiff by leave of court filed a supplemental amendment to the complaint which alleged that subsequent to the filing of the complaint the plaintiff, on

February 27, 1942, addressed a communication to all of the defendants whereby certain requests were made which include a request that defendants supply the data concerning the term of office held by each of the defendants, either as officer or director, commencing with the year 1937 to the date of said letter; and the information with reference to same as furnished by defendants' counsel was set up in the supplemental amendment.

By an amendment to said Supplemental Amendment it was alleged that the resolution authorizing counsel to plead the corporation guilty was adopted at the suggestion of the counsel named in the resolution under the arrangement to relieve the corporate officers and directors from their crimes and penalties, and to foist upon the corporation the penalties for the crimes committed by the corporate officers and directors, and to burden it with the expenses, liability and responsibility; that it was the duty of the directors to defend said indictment; to use ordinary diligence in the management of the corporate affairs, and that they were guilty of negligence in failing to use diligence.

In the supplemental amendment it was further alleged that "plaintiff is informed and verily believes the information to be true, that the matters and things charged in the indictment, which was made a part of the complaint, were in fact true."

In the motions of the defendants to dismiss the complaint as supplemented and amended, the unconstitutionality of the Public Utility Holding Company Act of 1935 was relied upon as one of the grounds for the dismissal. The Supreme Court in its opinion, directing transfer of the cause to this court, stated that no reason was set out by the chancellor for the ruling and that nothing appeared in the record to indicate that he passed upon the constitutionality of the Act. Upon oral argument of this case the question of the constitutionality of said Act was waived, so that it is not

necessary for this court to pass upon that question.

The questions raised by the motions of the defendants are (a) that the complaint does not state a cause of action against any of the defendants, and (b) that a demand should have been made by plaintiff upon the directors and shareholders of the corporate defendant for the institution of proceedings against the defendants, and the facts alleged by him in the complaint as supplemented and amended are insufficient to excuse the making of such demand.

An analysis of the complaint as supplemented and amended shows that it is alleged that an indictment was returned against the corporate defendant and the individual defendants, James B. Mortimer, Henry L. Hanley and Aura C. Hall, and the allegations of the indictment are set out in detail in the complaint, and a copy of said indictment is attached to the complaint as amended, but nowhere in the complaint or in the supplemented amendment as amended is there any allegation that the defendants, or any of them (1) arranged with attorneys employed by the Illinois Iowa Power Company to receive legal fees and retainers from said corporation, for actual or purported legal services, with the understanding that a portion of said legal fees and retainers would be secretly refunded in currency to any of said defendants or that any such refunds were in fact made to any of the defendants; (2) caused persons employed by the Illinois Iowa Power Company, at agreed salaries, to receive amounts from said corporation, purportedly as salaries, but in amounts in excess of their agreed salaries, with the understanding that the sums in excess of such agreed salaries of such persons would be secretly refunded in currency by said persons to any of the defendants, or that any such payments were in fact made to any of the defendants; (3) arranged with contractors employed by said Illinois Iowa Power Company, for such contractors secretly to refund

necessary for this court to pass upon this.

The question raised by the motion is whether or not

(a) that the complaint does not state a cause of action

any of the defendants, and (b) that a cause of action exists

in plaintiff's favor against the defendants.

Defendants for the purpose of this motion are

and the same alleged by the complaint to be

charged and liable to the plaintiff.

It is alleged that the plaintiff

owns and is entitled to the use and possession of

the premises situated in the City of Chicago, Illinois

known as the premises of the plaintiff.

The plaintiff has been in possession of the premises

of all his life, and the same are

nowhere in the complaint stated to be

in some way affected by the defendants.

Arranged with a view to the plaintiff's recovery

to receive the same, the plaintiff has

acted on the basis of the complaint and

action of the plaintiff is the only one

in connection with the complaint and the same

in fact was to pay the same to the plaintiff

by the Illinois law, and the same is

amounts from all defendants, jointly and

amounts in respect of their alleged liability

that the sum in respect of such alleged liability

be exactly returned to plaintiff by the

defendants, or that any such amount be paid to any of

the defendants; (3) arranged with defendants

Illinois law, and the same is

amounts from all defendants, jointly and

in currency to any of the defendants, in the guise of purported personal loans to any of the defendants, and otherwise, portions of the amounts paid to such contractors by said corporation, for their services as such contractors, or that any such refunds were in fact so made; (4) arranged with persons employed by said Illinois Iowa Power Company to submit bills to said corporation for purported expenses, for fraudulent, fictitious and inflated amounts in excess of the amounts due such persons for expenses actually incurred by them on behalf of said corporation, with the understanding that the sums in excess of the amounts due to such persons for actual expenses would be secretly refunded in currency by said persons to said defendants, or that any such sums were in fact paid to any of the defendants.

There are in fact no allegations in the complaint as supplemented and amended which set forth any of the facts described in the indictment as having in fact been done or committed by any of the defendants. As the plaintiff's pleading stands, there is a mere allegation of the return of the indictment and the various allegations made in the indictment. There is no allegation that the facts as alleged in the indictment actually happened or that the defendants in the indictment actually did the acts therein set forth. The allegation in paragraph 3 of the Supplemental Amendment to the Complaint that "plaintiff is informed, and verily believes the information to be true, that the matters and things charged in the indictment, which is made a part of the complaint, are in fact true," is merely an allegation of the belief of the plaintiff that the facts alleged in the indictment are true. This is not an allegation that said facts actually are true. In Hulse v. Nash, 332 Ill. 500, 507, the court said, "An averment that the pleader is informed and believes certain facts are true is not equivalent to an averment that such facts are true and * * * the former averment is improper and fatally

in answer to any of the defendant's, in the light of the
personal loans to any of the defendant, the defendant's, defendant's
of the amounts paid to such defendant, the defendant's, defendant's
their services as such defendant, on the 1st day of January, 1911
in fact as made; (4) defendant's, defendant's, defendant's
low power company to which the defendant's, defendant's, defendant's
expense, for defendant's, defendant's, defendant's, defendant's
of the amounts paid to such defendant, on the 1st day of January, 1911
then on behalf of the defendant's, defendant's, defendant's, defendant's
the case in order of the defendant's, defendant's, defendant's, defendant's
expenses would be actually paid to the defendant's, defendant's, defendant's
said defendant's, on the 1st day of January, 1911, the defendant's, defendant's
of the defendant's.

There are in fact no allegations in the indictment as
suggested and stated which are such as to be stated
in the indictment as being in fact no allegations as to any
of the defendant's, as the defendant's, defendant's, defendant's
were allegations of the defendant's, defendant's, defendant's, defendant's
allegations are in fact no allegations, as to the defendant's, defendant's
facts as alleged in the indictment actually occurred in fact
defendants in the indictment actually occurred in fact as stated
The allegations in paragraph 7 of the indictment are such as to be
Complaint that "plaintiff is interested, and really believes the
information to be true, that the defendant's, defendant's, defendant's, defendant's
indictment, which is made a part of the complaint, are in fact true,
is merely an allegation of the truth of the defendant's, defendant's, defendant's
alleged in the indictment are true. This is not an allegation that
said facts actually are true. In United v. Hall, 250 U.S. 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

defective because an issue on such an averment merely challenges the existence of such information and belief and not the truth or falsity of the facts to which reference is made." In Murphy v. Murphy, 189 Ill. 360, 366, the court said, "A mere statement that the plaintiff is informed and believes, puts in issue only his information and belief, and not the truth or falsity of the facts thus referred to."

The attaching of the indictment to the complaint as an exhibit did not take the place of allegations of facts which would show a liability upon the part of the defendants. The indictment could not be received in evidence against the individual defendants as proof that they did the acts set forth in the indictment, and it follows that the attaching of a copy of the indictment to the complaint could not make the allegations in the indictment allegations that the defendants in the indictment did the acts set forth in the indictment.

Plaintiff contends that in paragraph 8 of his complaint, it is alleged "that a corporation can act and speak only through its corporate officers and directors, and the crimes that were committed, to which the corporate officers have confessed on behalf of the corporation, were not actually committed by the corporation but by the defendants, its officers and directors, who acted on its behalf", and that in the supplemental amendment as amended the allegations, which are similar in form to the above, constitute allegations that the acts charged in the indictment have been in fact committed by the defendants. We cannot agree with this contention. A pleading must contain direct and positive averments of fact and not averments which can only be considered averments of fact by inference. The allegations referred to are indirect and not positive, and can not be held to be averments of the character and kind required in pleadings in the courts of this State. (Babcock v. Chicago Railways Co., 325 Ill. 16; Wallach v. Billings, 277 Ill. 218.)

The allegation that a plea of guilty was filed by the corporation pursuant to a resolution of the Board of Directors of the corporation does not state a cause of action against the defendants, even though the plaintiff alleges that the corporation was not guilty of the acts charged in the indictment and that the individual defendants were in fact guilty of the crimes referred to in the indictment. Any criminal charge or conviction thereof against a corporation must always be based upon acts of its officers or agents because the corporation can only act through its officers or agents. Under the contention of counsel for plaintiff a corporation is never itself guilty of a criminal act, but its officers and agents are the ones who are guilty. This amounts to a claim that a corporation can never be found guilty of a crime, but no citation is necessary to show the fallacy of this contention. A corporation can be convicted of a crime by reason of acts of its officers and agents, and it follows that the board of directors of a corporation could legally pass a resolution authorizing its attorneys to enter a plea of guilty.

None of the directors of the corporate defendant who passed the resolution were defendants in the indictment. Hall, Hanley and Mortimer were not directors at the time the resolution to enter a plea of guilty was passed. The directors who passed the resolution were vested with full authority under the laws of this State to handle the affairs of the corporation, and they had the power to pass such resolution. In their best judgment they had the right to say that it was in the best interests of the corporation to enter a plea of guilty; they may have considered that a criminal trial, even though resulting in an acquittal, would be more injurious to the business of the corporation than to enter a plea of guilty with an attendant fine of \$5000; they may have considered that the expense of defending the corporation in the trial of the indictment would far exceed the amount of the fine; they may have considered that the preparation and attendance at the trial of executive officers of

The allegation that a fine of \$100,000 was levied by the

corporation pursuant to a resolution of its board of directors is

the corporation does not admit a charge of fraud. This is

defendant's, even though the corporation is not a party to the

was not guilty of the act. It is not a party to the act and

individual defendants are not parties to the act and

to in the indictment. The corporation is not a party to the

against a corporation and it is not a party to the act and

or agents of the corporation are not parties to the act and

officer or agent. The corporation is not a party to the act and

a corporation is not a party to the act and

officers and agents are not parties to the act and

a claim that a corporation is not a party to the act and

but no objection is made to the corporation being a party to the act and

A corporation can be a party to the act and

officers and agents are not parties to the act and

a corporation can be a party to the act and

attorneys are not parties to the act and

None of the allegations in the indictment are

based on the resolution of the board of directors. The corporation

and Northern are not parties to the act and

a claim of guilty is made. The corporation is not a party to the act and

were vested with this authority and a claim of guilty is

handle the affairs of the corporation, and they are not parties to the act and

such resolution. In such case judgment may be rendered in favor

that it was in the best interests of the corporation to enter a claim

of guilty; they may have considered this a prudent claim, even

though resulting in a verdict, would be not injurious to the

business of the corporation than to enter a claim of guilty with an

attendant fine of \$100,000; they may have considered that the expense

of defending the corporation in the trial of the indictment would

it exceed the amount of the fine; they may have considered that the

the corporation might result in a serious detriment to the business affairs of the corporation because of their inability to attend to important executive affairs of the corporation; and they may have had other legitimate reasons for feeling that it was for the best interests of the corporation that the pending indictment be disposed of promptly and with as little expense as possible. To review the resolution thus passed by the directors of the corporation, under the facts and circumstances presented by the complaint and to hold that the directors became liable for the vote they cast on this question would effectually prevent any corporation director from voting that a plea of guilty be entered in any criminal action taken against his corporation, because his mere acquiescence in such plea would subject him to the financial liability of any fine that might be assessed against the corporation on its plea of guilty. Under our modern system of law, Federal and State, there are many penalties that may be assessed against corporations for violation of anti-trust laws, sales in violation of maximum prices established under O.P.A. Regulations, failure to make returns required by the Government, and a multiplicity of others. It would establish a dangerous precedent to hold that any director/who authorized a plea of guilty or acquiesced in a penalty assessed in any of these proceedings would incur a personal liability by so voting for acquiescence in court action with reference to same.

The board of directors of a corporation duly elected and constituted is entrusted with the management of the affairs of the corporation, and such directors may, so long as they are exercising their bona fide judgment in their discretion, vote for a resolution with reference to any criminal or civil case in which the corporation is a party. We are satisfied that the allegations of the complaint as amended and supplemented (disregarding the conclusions of the pleader) do not allege sufficient facts to show any liability upon the part of the directors of the defendant corporation, through their

vote authorizing the plea of guilty in the indictment returned against the corporation.

With reference to the claim of negligence against the defendants who are or were directors, we are satisfied that the complaint as supplemented and amended did not set forth a cause of action against such defendants.

We have also considered the question of the failure of the plaintiff to make a demand upon the directors of the corporation to institute suit against Mortimer, Hanley and Hall to recover moneys claimed to have been fraudulently taken by them from the corporation. At the time the plea of guilty was authorized by the directors, Mortimer, Hanley and Hall were not directors, and we have held that the remaining directors could properly in their discretion pass such a resolution as they did pass without rendering the directors who voted in favor of said resolution personally liable for any fine that might be assessed against the corporation. Since these directors were not liable for any moneys claimed to have been taken by Mortimer, Hanley and Hall, it cannot be said that they were so interested in the matter that they could not exercise their judgment upon a proper demand as to whether suit would or would not be instituted.

There is no allegation that the persons who were directors of the corporation at the time plaintiff instituted his suit committed or participated in any of the acts alleged to have been committed in the indictment, or even that such directors had knowledge or notice thereof. Under these circumstances it was incumbent upon plaintiff to make a demand upon the directors of the defendant corporation that they institute suit, before plaintiff could legally sue in behalf of the corporation. (Haves v. Oakland, 104 U.S. 450; Lucking v. Belano, 129 F (2d) 283.)

The decree of the Superior Court in dismissing the complaint was correct and its action in that regard should be and is affirmed.

AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.

1. The first group of people who are not in the labor force are those who are not in the labor force because they are not in the labor force.

... ..

1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 26

Journal of Management Education 35(10) 1109-1124

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42659

STANDARD OIL COMPANY, a corporation,

Appellee,

v.

GLOBE CARTAGE COMPANY, INC.,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE LUPA DELIVERED THE OPINION OF THE COURT.

The Standard Oil Company, plaintiff herein, instituted suit in the Municipal Court of Chicago against the defendant, Globe Cartage Company. The claim of the plaintiff is that it sold and delivered gasoline to the defendant. The defendant denied the sale and delivery of any gasoline. Upon the trial without a jury the court entered a judgment against the defendant for the sum of \$3,417.08. This appeal followed.

The questions presented are (1) whether there is any evidence in the record which shows a sale and delivery of gasoline to the defendant, and (2) whether there was an account stated between the parties.

In May of 1938, Globe Garages, Inc., a corporation (not a party to this suit), was engaged in the general garage business in Chicago, selling oil, gasoline, etc. Plaintiff solicited Globe Garages, Inc., for the purpose of selling it gasoline. In the course of the conversation, it developed that there was some question as to the credit rating of said Globe Garages, Inc., and as to sales tax. It was agreed that the sale of gasoline would be made to the defendant Globe Cartage Company, Inc., Monark Motor Freight System, Inc., and Hancock Truck Lines, Inc., and that the sales would be made direct to these operating companies, and that deliveries

STANDARD OIL COMPANY, a corporation,
 Appellee,
 v.
 GLOBE TRUCK COMPANY, INC.,
 Appellant.

1938

U. S. DISTRICT COURT FOR THE DISTRICT OF CHICAGO

The Standard Oil Company, plaintiff herein, instituted suit in the United States District Court at Chicago against the defendant, Globe Truck Company, Inc. The claim of the plaintiff is that it sold and delivered gasoline to the defendant. The defendant denied the sale and delivery of any gasoline. Upon the trial before a jury the court entered a judgment against the defendant for the sum of \$2,417.03. This appeal followed.

The questions presented are (1) whether there is any evidence in the record which shows a sale and delivery of gasoline to the defendant, and (2) whether there was an account stated between the parties.

In May of 1935, Globe Truck Company, Inc., a corporation (not a party to this suit), was entered in the general license business in Chicago, selling oil, gasoline, etc. Plaintiff sold gasoline to Globe Truck Company, Inc., for the purpose of selling it to gasoline. In the course of the conversation, it developed that there was some question as to the credit rating of said Globe Truck Company, Inc., and as to sales tax. It was agreed that the sale of gasoline would be made to the defendant Globe Truck Company, Inc., without motor freight system, Inc., and Hancock Truck Lines, Inc., and that the sales would be made direct to these operating companies, and that deliveries

would be made to them seriatim and thus save the sales tax which would have to be paid if Globe Garages, Inc. (which furnished garage space to the operating companies) bought the gasoline and in turn sold it to each of these companies. The arrangement was agreed upon and in accordance therewith this procedure was followed.

The record discloses that Major A. Riddle, president of Globe Garages, Inc., was also president and treasurer of Globe Cartage Company, but was not financially interested nor an officer of either Hancock Truck Lines or Monark Motor Freight System, Inc., in May, 1938.

On February 28, 1941, Globe Garages, Inc. discontinued business, and Monark Motor Freight System, Inc. assumed its assets and liabilities, at which time there was money due and owing plaintiff for merchandise sold and delivered. The evidence shows that after Monark Motor Freight System took over the assets and obligations of Globe Garages, Inc., Monark and plaintiff agreed upon a plan to pay the outstanding amount due. It was accordingly arranged that when a car of gasoline was purchased in the future, payment was to be made of the amount of the car, but credited to the oldest car outstanding on the books and heretofore charged to either Hancock Truck Lines or Globe Cartage Company, plus a cent or a cent and a half a gallon to liquidate the account more readily. As to the items of purchases on July 22, 1941, in the amount of \$1031.24, August 4, 1941, of \$1032.65, August 13, 1941, of \$1033.80, and August 27, 1941, of \$1022.80, the record clearly shows that the orders were made by Monark Motor Freight System, Inc. This is further evidenced by the exhibits in the record and by the payments that were made at the time of said orders, which were applied to the old account in accordance with the understanding of July, 1941, except the check from Globe Garages, Inc. dated August 2, 1941.

would be made so that certain and thus save the sales tax which would have to be paid if Globe Garage, Inc. (which furnished garage space to the operating company) bought the machine and in turn sold it to each of these companies. The arrangement was agreed upon and in accordance therewith this procedure was followed. The record discloses that Edgar A. Wilson, president of

Globe Garage, Inc., was also president and treasurer of Globe Garage Company, but was not financially interested nor an officer of either Hancock Truck Line or Hancock Motor Freight System, Inc., in May, 1941.

On February 28, 1941, Globe Garage, Inc. discontinued business, and Hancock Motor Freight System, Inc. assumed its assets and liabilities, at which time there was money due to and from each firm for merchandise sold and delivered. The evidence shows that after Hancock Motor Freight System took over the assets and liabilities of Globe Garage, Inc., Hancock and Wilson agreed upon a plan to pay the outstanding amount due. It was accordingly arranged that when a car of gasoline was purchased in the future, payment was to be made of the amount of the car, but credited to the oldest car outstanding on the books and therefore charged to either Hancock Truck Line or Globe Garage Company, plus a cent or a cent and a half a gallon to liquidate the account more readily. As to the items of purchases on July 22, 1941, in the amount of \$1071.25, August 4, 1941, of \$1082.50, August 15, 1941, of \$1033.20, and August 27, 1941, of \$1062.50, the record clearly shows that the orders were made by Hancock Motor Freight System, Inc. This is further evidenced by the entries in the record and of the payments that were made at the time of said orders, which were applied to the old account in accordance with the understanding of July, 1941, except the check from Globe Garage, Inc. dated August 2, 1941.

It was the duty of the plaintiff to see that deliveries of gasoline sold were made to the particular one of the three companies to which a sale was made.

We also notice from the record that the original billing as to one of the items in controversy was to Monark Motor Freight System, Inc., and this billing was received by Monark on July 30, 1941 and was made by the plaintiff after it had received a purchase order from Monark dated July 21, 1941, and that this shipment was made by plaintiff on July 22, 1941. However, we find that thereafter a corrected invoice was made by plaintiff, showing defendant as the purchaser of the gasoline shipped. This corrected invoice was dated August 7, 1941, after there had been a meeting of the creditors of Monark held on August 5, 1941 attended by plaintiff's credit manager.

The evidence further showed that the remaining invoices which were billed to defendant were based on purchase orders from Monark and one of the invoices carried the Monark purchase order number 4914. These items were shipped by plaintiff upon receipt of purchase orders accompanied by checks of the Monark Motor Freight System, Inc., in accordance with the understanding between the parties in July of 1941.

The only evidence of actual delivery of the gasoline to the defendant consisted of an account of the plaintiff in its books showing a charge to the defendant for this gasoline, a tank wagon contract between the parties, and three way-bills which were merely receipts for empty cars which were picked up at the switchtrack of the American Terminal Company and which was the address of the terminal of Monark Motor Freight System, Inc. and not of the defendant. There was no evidence brought or adduced by plaintiff of any purchase orders signed by the defendant for the particular items of gasoline in controversy, nor did it produce or offer in evidence any receipt signed by the defendant or anyone acting for it, nor was there any evidence of actual delivery of the gasoline in question to the defendant.

It was the duty of the plaintiff to see that deliveries of gasoline sold were made to the particular one of the three companies to which a sale was made.

We also notice from the record that the original billing as to one of the items in controversy was to Monark Motor Freight System, Inc., and this billing was received by Monark on July 30, 1941 and was made by the plaintiff after it had received a purchase order from Monark dated July 21, 1941, and that said shipment was made by plaintiff on July 23, 1941. However, it is not thereafter a corrected invoice was made by plaintiff, showing defendant as the purchaser of the gasoline shipped. This corrected invoice was dated August 7, 1941, after there had been a meeting of the officers of Monark held on August 5, 1941 attended by plaintiff's credit manager.

The evidence further shows that the remaining invoices which were billed to defendant were based on purchase orders from Monark and one of the invoices recited the Monark purchase order number 4014. These items were delivered by plaintiff upon receipt of purchase orders accompanied by checks of the Monark Motor Freight System, Inc., in accordance with the understanding between the parties in July of 1941.

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The burden of proof was upon the plaintiff. We are satisfied that it failed to prove sale and delivery to defendant of the gasoline in question, and that the finding of the trial court on the question of sale and delivery is manifestly against the weight of the evidence.

On the question of an account stated, if there was no sale or delivery of the gasoline in question to the defendant, there could be no account stated between the parties. (James D. Williams, etc. v. Joseph Krug, 197 Ill. App. 483.) Defendant did not assent to the validity and accuracy of plaintiff's account. The rule that an account which had been rendered and to which no objection had been made within a reasonable time is to be regarded as admitted by the party charged as prima facie correct, assumes that there was some indebtedness between the parties, for there can be no liability on an account stated if no liability in fact exists, and the mere presentation of a claim, although not objected to, cannot of itself create a liability. (1 Am. Jur. 282.) An account stated cannot be made the instrument to create an original liability; it merely determines the amount of the debt where liability previously existed. (Conley v. National House Furnishing Co., 292 Ill. App. 552.)

There was not sufficient evidence in the record to warrant a finding of an account stated between the parties.

There is no need to pass upon the other questions presented, in view of our holding.

For the reasons hereinabove given, the judgment of the trial court is reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

JUDGMENT REVERSED AND REMANDED.

BURKE, P.J. AND KILEY, J. CONCUR.

The burden of proof was upon the plaintiff. He was

entitled that it failed to prove sale and delivery to defendant of the gasoline in question, and that the finding of the trial court on the question of sale and delivery is manifestly against the weight of the evidence.

On the question of an account stated, it there was no

sale or delivery of the gasoline in question to the defendant.

There could be no account stated between the parties. James B. Wilson

et. v. Joseph Ford, 197 Ill. App. 433. (1923) would not permit

to the validity and accuracy of plaintiff's account. The rule that

an account which had been rendered and to which no objection had

been made within a reasonable time is to be regarded as established by

the party charged as being final correct, unless that party has some

independent evidence between the parties, for there can be no liability on

an account stated if no liability is laid down, and the mere

presentation of a claim, although not rejected by, amount of itself

creates a liability. Ill. Civ. 1921, 1922, an account stated cannot be

made the instrument to create an original liability; it merely

determines the amount of the debt where liability previously existed.

Quincy v. National Bank Building Co., 202 Ill. 100. 1905.

There was not sufficient evidence in the record to warrant

a finding of an account stated between the parties.

There is no need to give upon the other questions presented.

in view of our holding.

For the reasons hereinabove given, the judgment of the trial

court is reversed and the cause remanded for further proceedings not

inconsistent with the views herein expressed.

JUDGMENT REVERSED AND REMANDED.

BURNS, C.J. AND KILPATRICK, J. CONCUR.

42898

VALERIA KUCIA, a minor, by ANTON
KUCIA, her father and next friend,

Appellant,

v.

HARRY ROSENFELD, d.b.a. Sterling
Material Supply Company, and
SAM JONES,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

32-1-38

MR. JUSTICE LUPP DELIVERED THE OPINION OF THE COURT
ON REHEARING.

This is a suit by plaintiff, a minor, to recover for personal injuries alleged to have been caused by a truck owned by defendant Harry Rosenfield, d.b.a. Sterling Supply Company, and driven by defendant Sam Jones its employee, on or about July 17, 1941, on Homan Avenue at or near 23rd Street in the city of Chicago, Illinois. The first count of the complaint charges ordinary negligence and the second count charges wanton and willful conduct in the operation of a truck through a built-up residential section of the city of Chicago. Defendants answered denying the material allegations of the complaint and admitted ownership and operation of the truck.

The cause was tried by a jury which returned a verdict of not guilty. Judgment was entered thereon, from which this appeal followed.

The record shows that the plaintiff was a child of upwards of seven years of age at the time of the occurrence and that the accident in question occurred on Sawyer Avenue instead of on Homan Avenue as alleged in the complaint, and that the neighborhood wherein this accident occurred is a built-up residential neighborhood.

VALERIA KUCIA, a minor, by mother,
KUCIA, her father and next friend,

Defendant,

v.

HARRY ROSENBERG, D.D.S., a minor,
Metropolitan Supply Company, and
SAM JONES,

Plaintiffs.

ON DEFENDANT'S

Motion to Dismiss, the Court says:

Defendant's motion is based on the fact that the complaint
alleges that Harry Rosenberg, D.D.S., a minor, and his mother, Valeria Kucia, a minor, by her father and next friend, Sam Jones, are the plaintiffs in this case.

It is alleged that on or about July 17, 1941, the defendant, Harry Rosenberg, D.D.S., a minor, and his mother, Valeria Kucia, a minor, by her father and next friend, Sam Jones, were driving a car on Foster Avenue in Chicago, Illinois, and that the car was struck by a car owned and driven by the plaintiff, Sam Jones.

It is further alleged that the car owned and driven by the plaintiff, Sam Jones, was damaged as a result of the collision.

It is also alleged that the defendant, Harry Rosenberg, D.D.S., a minor, and his mother, Valeria Kucia, a minor, by her father and next friend, Sam Jones, are entitled to recover damages from the plaintiff, Sam Jones, as a result of the collision.

The defendant, Harry Rosenberg, D.D.S., a minor, and his mother, Valeria Kucia, a minor, by her father and next friend, Sam Jones, are entitled to recover damages from the plaintiff, Sam Jones, as a result of the collision.

The defendant, Harry Rosenberg, D.D.S., a minor, and his mother, Valeria Kucia, a minor, by her father and next friend, Sam Jones, are entitled to recover damages from the plaintiff, Sam Jones, as a result of the collision.

The defendant, Harry Rosenberg, D.D.S., a minor, and his mother, Valeria Kucia, a minor, by her father and next friend, Sam Jones, are entitled to recover damages from the plaintiff, Sam Jones, as a result of the collision.

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The defendant, Harry Rosenberg, D.D.S., a minor, and his mother, Valeria Kucia, a minor, by her father and next friend, Sam Jones, are entitled to recover damages from the plaintiff, Sam Jones, as a result of the collision.

The court says that the complaint is sufficient to state a claim for relief and that the motion to dismiss should be denied.

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Summarizing the contentions of plaintiff, she contends that the court erred (1) in denying the motion for new trial, alleging that the verdict was against the weight of the evidence; (2) that certain instructions were erroneous; and (3) that the conduct of defendant's attorney in interrogating plaintiff, as well as his argument before the jury, was improper.

The evidence in this case discloses that Valeria Kucia, the plaintiff, residing at 2214 South Sawyer Avenue, was on her way to the store located on the corner of 23rd Street and Sawyer Avenue. She proceeded south on the west side of Sawyer Avenue to about the middle of the block, and attempted to cross the street in an easterly direction. In doing so she came in contact with a northbound truck driven by defendant Sam Jones. The injuries received by the plaintiff necessitated the care and attention of a physician from July 21, 1941 to March 19, 1942.

The record shows that at the time plaintiff left the sidewalk in her attempt to cross the street, cars were parked alongside of the west curb, and she testified that, "I could not see any automobile coming, on account of the automobile there." Plaintiff's witnesses testified the truck was traveling between 30 and 40 miles per hour at the time of the occurrence, and they heard no sound of a horn. Plaintiff said she did not see the truck before it hit her, and did not know what she had come in contact with.

Sam Jones, defendant, testified that he was proceeding north on Sawyer Avenue; that the speed of the truck was controlled by a governor limiting it to 25 miles per hour; that he did not see the plaintiff and knew nothing of the accident until he was informed of it later, while making a delivery on 22nd street; that

...the court erred (1) in holding the action for new trial, alleging that the verdict was against the weight of the evidence; (2) that certain instructions were erroneous; and (3) that the conduct of defendant's attorney in introducing evidence, as well as his argument before the jury, was improper.

The evidence in this case discloses that Plaintiff, residing at 1111 West 12th Street, St. Paul, Minn., was on his way to the store located at the corner of 12th Street and Sawyer Avenue. The proceeds south on the west side of Sawyer Avenue about the middle of the block, and returning to his home in an easterly direction. In doing so he was in contact with a northbound truck driven by defendant's son. He testified that he was not injured by the collision and that he was not aware of the fact that a physician from July 27, 1941 to March 29, 1942.

The record shows that at the time Plaintiff left his sidewalk in her attempt to cross the street, she was walking alongside of the west curb, and was walking north. It would not see any automobile coming, or sound of any automobile from Plaintiff's witnesses testified that there was no collision between 20 and 40 miles per hour at the time of the collision, and they heard no sound of a truck. Plaintiff said she did not see the truck before it hit her, and did not know what she had done in contact with.

Tom Jones, defendant, testified that he was proceeding north on Sawyer Avenue; that the rear of the truck was controlled by a governor limiting it to 40 miles per hour; that he did not see the Plaintiff and knew nothing of the collision until he was informed of it later, while making a delivery on 6th Street; that

he then came back to the scene of the accident and immediately phoned for the police; and that when the police arrived, they made an inspection of the truck for marks, etc., but found none.

Jerry Rehor testified he was in the employ of Liquid Carbonic Company and was driving his truck about 100 feet immediately behind the truck of the defendant at the time of the occurrence; and that his truck, and that of the defendant, were traveling about ten to fifteen miles per hour and that the plaintiff ran out from between two parked cars as defendant's truck was passing said cars, and came in contact with the back end of defendant's truck.

There is a conflict in the evidence, as can clearly be seen, first as to the question of speed of defendant's truck, and, secondly, whether or not the truck hit the child or she ran into the back end of it. There can be little question, from the entire record in this case, that automobiles were parked next to the curb where the accident occurred. Whether or not plaintiff came from between the parked cars and that defendant saw her or could have seen her by use of ordinary care, were questions of fact for the jury. However, plaintiff testified that she could not see any automobile coming on account of the automobile there. The jury undoubtedly considered all the evidence in the case, including this testimony of the plaintiff, and it is obvious that if her testimony was true it would have been impossible for her to see any object coming or going along Sawyer Avenue.

Controverted questions of fact are for the jury to decide and after they have decided such facts a court of review will not set aside their verdict unless it can say that the verdict of the jury is against the manifest weight of the evidence. From a review of the evidence in this case it is our conclusion that the verdict of the jury is not against the weight of the evidence. (McGoorty v. Benhart, 305 Ill. App. 458; McCarty v. Yates, 294 Ill. App. 474.)

He then came back to the scene of the accident and immediately
 phoned for the police; and that when the police arrived, they made
 an inspection of the truck for marks, etc., but found none.

Jerry Hektor testified he was in the employ of J. J.

Gerber's Garage and was driving the truck at the time of the accident;
 behind the truck of the defendant at the time of the accident;
 and that his truck, and that of the defendant, were traveling about
 ten to fifteen miles per hour and that the truck of the defendant
 between the car and the defendant's truck was traveling at the same
 and came in contact with the car and the defendant's truck.

There is a conflict in the testimony as to whether or

seen, first as to the position of the truck at the time of the

secondly, whether or not the truck of the defendant was in the

the back end of it. There was no evidence from the police

record in this case, that either of the trucks was in the

where the accident occurred. Whether or not plaintiff came from

between the parked cars and that defendant was not a conflict as to

her by use of ordinary care, were questions of fact for the jury.

However, plaintiff testified that she could not see any automobiles

coming on account of the darkness of the night. The jury

considered all the evidence in the case, including this testimony

of the plaintiff, and it is obvious that it was testimony that

it would have been impossible for her to see any object coming or going

along Sawyer Avenue.

Contrary to the testimony of fact are for the jury to decide

and after they have decided upon facts a court of review will not

set aside their verdict unless it can say that the verdict of the

jury is against the manifest weight of the evidence. From a review

of the evidence in this case it is our conclusion that the verdict

of the jury is not against the weight of the evidence. (Hector v.

Barney, 305 Ill. App. 453; Hector v. Yates, 384 Ill. App. 474.)

We find no objection to the instructions complained of when they are considered and read together with all the instructions given in the case.

Complaint is made of the conduct of defendants' attorney in interrogating the plaintiff, and attention is called to certain questions asked and answers made thereto by plaintiff. All we can discover after a careful reading of the evidence referred to is that defendants' attorney was attempting to secure answers to proper questions that were propounded to the witness, which it was his duty to do. The questions that he propounded to the witness were proper and were not argumentative (that being the ground upon which plaintiff objected) nor objectionable, nor did the mere fact that, after the witness made answer thereto counsel for defendants remarked, "All right. Thank you so much", give rise to any ground for complaint. We have carefully examined the argument of defendant's counsel, and we find nothing therein that in any manner warrants or justifies the criticism made by plaintiff's counsel. Throughout the entire argument complained of no objection was made, and, no objection having been made, the point would necessarily be waived. Assuming that the statements made by counsel in his closing argument to the jury were improper, it was the duty of opposing counsel, whose client was unfavorably affected by the argument, to immediately call the same to the attention of the court, and, not having done so, he cannot now complain.

This cause has been submitted fairly to the jury who saw and heard the witnesses and were in a much better position to adjudge the truth of the matters in controversy than are we. (Skinner v. Sullivan, 127 Ill. App. 657; Adamsen v. Magnolia, 286 Ill. App. 412.)

We find no objection to the instructions contained in when they are considered and read together with all the instructions given in the case.

Complaint is made of the conduct of defendant's attorney in interrogating the plaintiff, and attention is called to certain questions asked and answers made thereto by plaintiff. All we can discover after a careful review of the evidence referred to is that defendant's attorney was attempting to bring answers to certain questions that were propounded to the witness, which it was his duty to do. The questions that he propounded to the witness were not argumentative (that being the ground upon which plaintiff objected) nor objectionable, nor did the witness feel that, after the witness made answer thereto, counsel for defendant persisted, "All right, thank you so much, give him to ask, thank you counsel." We have carefully examined the record of plaintiff's counsel, and we find nothing therein that in any manner tends to justify the criticism made by plaintiff's counsel. Throughout the entire argument complained of an objection was made, and no objection having been made, the court could not be expected to be guided. The statements made by counsel in the closing argument to the jury were improper, it was the duty of opposing counsel, whose client was unfavorably affected by the argument, to insist that the same to the attention of the jury, and, not having done so, we cannot now complain.

This court has been furnished fairly to the jury who saw and heard the witness and were in a much better position to judge the truth of the matter in controversy than we are.

(Ex parte v. Sullivan, 127 Ill. App. 557; Ex parte v. Sullivan, 128 Ill. App. 412.)

We have considered all other points properly raised by the respective parties, and are of the opinion that no error has been committed and the evidence amply supports the verdict of the jury and the judgment of the trial court is therefore affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.

We have considered all other cases properly raised by

the respective parties, and are of the opinion that no error has

been committed and the evidence amply supports the verdict of

the jury and the judgment of the trial court is therefore affirmed.

THE COURT AFFIRMS.

WILLIAM J. HARRIS, J. CLERK.

42898

VALERIA KUCIA, a minor, by
Anton Kucia, her father and
next friend,

Appellant,

vs.

HARRY ROSENFELD, d.o.b.
Sterling Material Supply
Company, and SAM JONES,

Appellees.

MR. PRESIDING JUSTICE HENRY DILLON, JR. COURT OF APPEALS.

This is an appeal from a judgment for the defendant in a personal injury case.

Plaintiff, a minor about seven years of age, was seriously injured by the defendant's truck on July 17, 1941, while she was attempting to cross Sawyer Avenue near Twenty-third Street in Chicago, Illinois. The plaintiff alleged ordinary negligence and willful and wanton conduct in the operation of the truck through a built-up residential section.

In the brief which was presented for the defendants the suggestion is offered that the court dismiss the appeal or that the judgment be affirmed pro forma for failure of the plaintiff to comply even substantially with the requirements for an appellate review of the trial court's judgment, which is presumed to be correct.

The notice of appeal states that plaintiff appeals from "the 'Not Guilty' verdict of the jury entered of record June 18 before the Honorable John Haas, Judge presiding, to reverse the verdict of the jury, and/or reverse or remand the case with directions for errors of record." There is no such proceeding as an appeal from the verdict. However, as this is an amendable defect, it is cited only for its cumulative effect

an amendable defect, it is cited only for its cumulative effect proceeding as an appeal from the verdict. However, as this is case with directions for errors of record." There is no such reverse the verdict of the jury, and/or reverse or remand the June 18 before the Honorable John Hane, Judge presiding, to from "the 'Not Guilty' verdict of the jury entered of record The notice of appeal states that plaintiff appeals presumed to be correct.

for an appellate review of the trial court's judgment, which is plaintiff to comply even substantially with the requirements or that the judgment be affirmed and for failure of the the suggestion is offered that the court dismiss the appeal In the brief which was presented for the defendants

the truck through a built-up residential section. negligence and willful and wanton conduct in the operation of Street in Chicago, Illinois. The plaintiff charged ordinary while she was attempting to cross Sawyer Avenue near Twenty-third seriously injured by the defendant's truck on July 17, 1941, Plaintiff, a minor about seven years old, was in a personal injury case.

This is an appeal from judgment for the defendant

MR. PRESIDING JUSTICE HANE DELIVERED THE OPINION OF THE COURT.

Appellees.

Company, and SAM JONES, Sterling Material Supply Harry ROSENTHAL, d.f.s.

vs.

Appellant.

next friend, Anton Kucia, her father and VALERIA KUCIA, a minor, by

COOK COUNTY SUPERIOR COURT
APPEAL FROM

3221A.322

428898

in showing that the plaintiff has not complied in form or substance with the plain and simple requirements of an appeal.

Defendant further calls to our attention that the abstract is not a good faith attempt at compliance with Rule 6 requiring an abstract "sufficient to present every error relied upon."

Plaintiff's argument that the verdict is against the manifest weight of the evidence may not be considered because the report of proceedings shows affirmatively that it does not contain all of the evidence and, further, the abstract does not contain a fair statement of the testimony included in the report of proceedings.

The argument that the trial judge erred in instructing the jury cannot be considered because the record filed does not show at whose request the challenged instructions were given, and the instructions are not set forth in the abstract.

Plaintiff's statement that defendant's counsel, A. R. Peterson, was guilty of improper conduct is wholly unsupported by the record or abstract and there is no showing of objection made or ruling sought of the trial judge.

Plaintiff's motion for a new trial is not abstracted, nor is the judgment of the trial court abstracted. Plaintiff filed a notice of appeal which is not abstracted but which appears from the record to be an appeal from the "not guilty verdict," and not an appeal from a judgment.

Both counts of the plaintiff's complaint alleged that she was a minor six years of age, that she "crossed Roman Avenue" from east to west just north of Twenty-third Street in the City of Chicago, and that she was at all times immediately

in showing that the plaintiff has not complied in form or substance with the plain and simple requirements of an appeal.

Defendant further calls to our attention that the abstract is not a good faith attempt at conciliation with Rule 6 requiring an abstract "sufficient to present every error relied upon."

Plaintiff's argument that the record is against the manifest weight of the evidence may not be considered because the report of proceedings shows affirmatively that it does not contain all of the evidence and, further, the report does not contain a fair statement of the testimony included in the report of proceedings.

The argument that the trial judge erred in instructing the jury cannot be considered because the record filed does not show at whose request the challenged instructions were given, and the instructions are not set forth in the abstract.

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Plaintiff's motion for a new trial is not abstracted, nor is the judgment of the trial court abstracted. Plaintiff filed a notice of appeal which is not abstracted but which appears from the record to be an appeal from the "not guilty verdict," and not an appeal from a judgment.

Both counts of the plaintiff's complaint alleged that she was a minor six years of age, that she "crossed Roman Avenue" from east to west just north of Twenty-third Street in the City of Chicago, and that she was at all times immediately

prior to the occurrence in the exercise of that degree of care and caution required of her age, intelligence, education and capacity. On the trial, however, it was proved and in plaintiff's brief it is now conceded that plaintiff was more than seven years old at the time of the accident. Also, it was proved that the accident happened on Sawyer Avenue, not Women Avenue.

All of the testimony of the defendants' witnesses is omitted from the abstract. The cross-examination of defendants' witness, Jerry Rehor and of the defendant, Sam Jones, is omitted from the report of proceedings. The trial judge's certificate recites that the report of proceedings "contains cert in parts of the evidence introduced at the trial." The plaintiff's original abstract recites that it contains "excerpts" from the testimony of the witnesses there named. The abstract does not contain the evidence. Defendant was not under obligation to supply these deficiencies but has supplied an additional abstract not intended to be complete but which is sufficient to show that vital evidence is omitted in the plaintiff's abstract. Appellant's abstract is not an attempt to comply with the rule requiring an abstract.

Defendant maintains that from testimony entirely omitted from plaintiff's abstract and brief it appeared that there were cars parked along both sides of Sawyer Avenue, a north and south street, at the time of the accident. Two cars were parked on the east side of the street, one facing north and one facing south, about 7 to 10 feet apart, and after the accident plaintiff was opposite the space between the parked cars

prior to the occurrence in the exercise of that degree of care and caution required of her age, intelligence, education and capacity. On the trial, however, it was proved and in plaintiff's brief it is now conceded that plaintiff was more than seven years old at the time of the accident. Also, it was proved that the accident happened on Sawyer Avenue, not Boston Avenue.

All of the testimony of the defendant's witnesses is omitted from the abstract. The cross-examination of defendant's witness, Jerry Nelson and of the defendant, Ned Jones, is omitted from the report of proceedings. The trial judge's certificate recites that the report of proceedings "contains certain parts of the evidence introduced at the trial." The plaintiff's original abstract recites that it contains "excerpts from the testimony of the witnesses there named. The abstract does not contain the evidence. Defendant was not under obligation to supply these deficiencies but has supplied an additional abstract not intended to be complete but which is sufficient to show that vital evidence is omitted in the plaintiff's abstract. Appellant's abstract is not an attempt to comply with the rule requiring an abstract.

Defendant maintains that from testimony entirely omitted from plaintiff's abstract and brief it appeared that there were cars parked along both sides of Sawyer Avenue, a north and south street, at the time of the accident. Two cars were parked on the east side of the street, one facing north and one facing south, about 7 to 10 feet apart, and after the accident plaintiff was opposite the space between the parked cars

and about 7 or 8 feet from the curb.

The driver, defendant Sam Jones, was shown by credible evidence, which is omitted from plaintiff's abstract and brief, to have been driving a Diamond T truck, with a governor limiting its speed to 25 miles per hour, north on Sawyer Avenue from Twenty-third Street toward Twenty-second Street, at a rate of speed of 10 to 12 or 15 miles per hour. He was followed at the same speed by the witness Jerry Behor, who was driving his own automobile northward about 50 feet behind the truck. In about the middle of the block, as appears from evidence entirely omitted from the original abstract, some children were playing in the street or on the sidewalk and just as the truck was passing the parked cars along the east curb of Sawyer Avenue, the plaintiff ran out from between these cars and ran into the back end of the truck and fell back in between the parked cars. The plaintiff testified that she did not hear the sound of a horn before she stepped off the curb into the street, but on cross-examination admitted that she was not paying very much attention. This is omitted from the plaintiff's abstract.

The driver, Sam Jones, did not know of the accident until he stopped his truck nearby, in the alley behind 3322 West Twenty-second Street, to make a delivery, and then a man came up and told him that a child had been hurt. This is omitted from plaintiff's abstract. Jones testified that the child did not run out or walk in front of the truck and no child came in contact with any part of the front of the truck as far back as he, the driver, was sitting. This is also omitted from plaintiff's abstract.

The driver immediately called the police and gave

and about 7 or 8 feet from the curb.

The driver, Defendant Ben Jones, was shown by credible evidence, which is omitted from Plaintiff's Exhibit and Brief, to have been driving a Diamond T truck, with a governor limiting

its speed to 35 miles per hour, north on several avenues from Twenty-third Street toward Twenty-second Street, at a rate of speed of 10 to 15 or 18 miles per hour. He was followed at the same speed by the witness Jerry Schot, who was driving his own automobile northward about 50 feet behind the truck. In about

the middle of the block, as appears from evidence entirely omitted from the original Exhibit, some children were playing in the street or on the sidewalk and just as the truck was

passing the parked cars along the east curb of Sawyer Avenue, the plaintiff ran out from between these cars and ran into the back end of the truck and fell back in between the parked cars.

The plaintiff testified that she did not hear the sound of a horn before she stopped off the curb into the street, but on cross-

examination admitted that she was not paying very much attention. This is omitted from the plaintiff's Exhibit.

The driver, Ben Jones, did not know of the accident

until he stopped his truck nearby, in an alley behind 3232 West Twenty-second Street, to make a delivery, and then a man came up and told him that a child had been hurt. This is omitted from

Plaintiff's Exhibit. Jones testified that the child did not

run out or walk in front of the truck and no child came in contact with any part of the front of the truck as far back as he, the driver, was sitting. This is also omitted from Plaintiff's

Exhibit.

The driver immediately called the police and gave

them a statement. An examination of the truck made immediately showed no marks whatever on it. This is omitted from plaintiff's abstract.

Evidence vitally affecting the credibility of plaintiff's witnesses is also omitted from the plaintiff's abstract. Plaintiff's admission that she did not look before stepping off the curb is one such instance. One of the plaintiff's witnesses, William Elendt, testified that the accident happened on a Saturday, although it was later stipulated that this date fell on a Thursday. Both this testimony and this stipulation are omitted from the original abstract.

Plaintiff's witness Frances Bracky testified that the plaintiff was crossing Sawyer Avenue from west to east, which was contrary to the allegation of the complaint and contrary to the testimony of every other witness in the case. This is omitted from plaintiff's abstract.

As to the jury instructions, none is preserved in the report of proceedings and plaintiff's treatment of them on this appeal led to great confusion and needless burden on the appellees. Plaintiff's praecipe for record called for "Instruction Number 6; Instruction Number 15; Instruction Number 17." These instructions are contained in the original transcript of record filed by plaintiff and in which the clerk of the trial court certified that they were "filed" in his office June 18, 1943. These instructions are not set out in the abstract but are merely indexed in the abstract as follows: "Defendant's Given Instructions 15, 17 (set out in brief)." The record does not show at whose request the instructions were given, so there was no warrant for describing them in the abstract as "Defendant's Given Instructions." Later, plaintiff sought and obtained

them a statement. An examination of the record made immediately showed no marks whatever on it. This is omitted from Plaintiff's abstract.

Evidence is fully reflecting the credibility of Plaintiff's witnesses is also omitted from the Plaintiff's abstract. Plaintiff's contention that she did not look at the report of the jury is one such instance. One of the Plaintiff's witnesses, William Blount, testified that the report was made on Thursday, although it was later reported that this was on Friday. Both this testimony and the other evidence are omitted from the original abstract.

Plaintiff's witness, George Henry testified that the Plaintiff was crossing a river at the time of the accident which was contrary to the allegation of the complaint and contrary to the testimony of every other witness in the case. This is omitted from Plaintiff's abstract.

As to the jury instructions, none is preserved in the report of proceedings and Plaintiff's treatment of them on this appeal led to great confusion and needless delay in the case. Plaintiff's practice for a long time has been to call for instructions Number 6; instruction Number 15; instruction Number 17. These instructions are contained in the original transcript of record filed by Plaintiff and in which the clerk of the trial court certified that they were "filed" in his office June 18, 1943. These instructions are not set out in the abstract but are merely indexed in the abstract as follows: "Defendant's given instructions 15, 17 (set out in brief)." The record does not show at whose request the instructions were given, so there was no warrant for describing them in the abstract as "Defendant's

leave of this court on October 4, 1943, to bring up an additional transcript certified September 27, 1943, containing instructions purportedly numbered 4, 5 and 8. This first additional transcript was filed on October 4, 1943, and not until plaintiff's brief was filed did defendants discover that instruction number 4 in the additional transcript was the same as number 15 in the original transcript. This instruction is printed in duplicate in plaintiff's brief as numbers 19 and 4. It then also appeared for the first time that instruction number 5 in the additional transcript was the same instruction as number 17 in the original transcript and this instruction was printed in duplicate as numbers 17 and 5 on pages 2 and 3 of plaintiff's brief. None of the instructions shown in the additional record filed October 4, 1943 is set forth in plaintiff's abstract but they are therein referred to as "defendant's given instructions 4, 5, 8." The additional transcript did not certify at whose request these instructions were given, but the copies of the three instructions in such additional transcript contained the respective typewritten notations "G 4 Deft.," "G 5 Deft.," and "G 8 Def.," which notations were apparently placed there by plaintiff's counsel as the notations were not on the originals on file in the trial court. Thus, it appearing through error that two duplicate instructions, 4 and 15, and 5 and 17, were filed with the trial court clerk and perhaps given by the trial judge and that three instructions bore identifying marks showing that they were given at the request of the defendant, the defendants procured photostat copies of all given instructions on file in the trial court. By leave of this court, defendants filed herein on November 30, 1943, a second additional transcript showing these eighteen given instructions and certified by the

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transcript certified September 27, 1943, containing instructions
leave of this court on October 4, 1943, to bring up an additional

trial court clerk as being prepared "for the purpose of eliminating duplicate instructions erroneously included in previous transcripts and for the purpose of eliminating certain markings on the face of copies of three instructions certified in error September 27, A.D. 1943." As shown by the abstract of the second additional record the originals on file in the trial court do not contain any duplicates, none is marked to show at whose request it was given, and the record does not otherwise indicate at whose request any were given.

To sum up the condition of the record concerning instructions: (1) The report of proceedings contains no instructions whatever; (2) The plaintiff's abstract contains no instructions whatever; (3) The common law record does not show at whose request any of the instructions was given.

As defendants aver, the abstract in this case presented to this court does not appear to be a good faith attempt to comply with the rules of the Appellate Court. It does not contain the judgment of the trial court, the motion for a new trial, the notice of appeal, the instructions of the trial judge or any evidence in the case except portions entitled as "Excerpts," which are taken from testimony of some, but not nearly all of the witnesses. Under the express language of Rule 6, the appellant's abstract must present fully every error relied on. Village of Winnetka v. McMartin, 351 Ill. 134; People v. Sherwin, 361 Ill. 403; Department of Finance v. Bode, 376 Ill. 374. Where the appellant has made no effort to comply with the rule, the appellee has no such obligation. The distinction was made thus in Hickox v. City of Springfield, 208 Ill. 28, where the court by Mr. Justice Wilkin said at page 30:

trial court clerk as being prepared "for the purpose of eliminating duplicate instructions erroneously included in previous transcripts and for the purpose of eliminating certain markings on the face of copies of three instructions certified in error September 27, A.D. 1943." As shown by the abstract of the second additional record the originals on file in the trial court do not contain any duplicates, none is noted to show at whose request it was given, and the record does not otherwise indicate at whose request any were given.

To sum up the condition of the record concerning instructions: (1) The report of proceedings contains no instructions whatever; (2) The plaintiff's abstract contains no instructions whatever; (3) The common law record does not show at whose request any of the instructions was given.

As defendants aver, the abstract in this case presented to this court does not appear to be a good faith attempt to comply with the rules of the appellate court. It does not contain the judgment of the trial court, the motion for a new trial, the notice of appeal, the instructions of the trial judge or any evidence in the case except portions entitled as "Excerpts," which are taken from testimony of some, but not nearly all of the witnesses. Under the express language of Rule 6, the appellant's abstract must present fully every error relied on. Willard v. Minnesota v. McMeekin, 351 Ill. 184; People v. Sherwin, 361 Ill. 408; Department of Finance v. Fode, 378 Ill. 374. Where the appellant has made no effort to comply with the rule, the appellee has no such obligation. The distinction was made thus in Hickox v. City of Springfield, 208 Ill. 28, where the court by Mr. Justice William

"Where a manifest attempt has been made to comply with this rule and the abstract is merely defective, it will be accepted by the court as sufficiently presenting the matters in issue, but if the opposing party is not satisfied with such abstract he may file an additional one and have the cost of the same taxed to the party filing the principal abstract, if the court shall finally determine that the additional abstract was necessary. This right of the opposing counsel, however, has never been construed to justify the filing of an abstract which does not pretend to comply with rule 14, and thereby compel the other party to do what the appellant or plaintiff in error should have done."

The Supreme Court said in Staudt v. Schumacher, 187 Ill. 187: "The judgment of the court below must be affirmed for want of a complete abstract."

This court finds that on account of failure of plaintiff's attorney to place before it the record in compliance with the rules of court it is unable to consider the evidence, for it is not here; it is not able to consider the instructions, for the instructions must be considered as a whole and in the order in which they were given; and as to plaintiff's allegations of misconduct on the part of defendant's attorney there is absolutely nothing in the record.

This court must therefore presume that the evidence presented in the trial court was sufficient to sustain the judgment for the defendant.

It is therefore ordered that the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

BURKE, J. and KILEY, J., CONCUR.

"Where a manifest attempt has been made to comply with this rule and the abstract is merely defective, it will be accepted by the court as sufficiently presenting the matters in issue, but if the opposing party is not satisfied with such abstract he may file an additional one and have the cost of the same taxed to the party filing the original abstract; if the court shall finally determine that the additional abstract was necessary. This right of the opposing counsel, however, has never been construed to justify the filing of an abstract which does not pretend to comply with rule 14, and thereby compel the other party to do what the applicant is plaintiff in error should have done."

The Supreme Court said in *Stacy v. Stacy*, 187 Ill. 187.

"The judgment of the court below was affirmed."

"For want of a complete abstract."

This court finds that on account of failure of plaintiff's

attorney to place before it the record in compliance with the

rules of court it is unable to consider the evidence, for it is

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instructions must be considered as a whole and in the order in

which they were given; and as to plaintiff's allegations of

misconduct on the part of defendant's attorney there is absolutely

nothing in the record.

This court must therefore presume that the evidence

presented in the trial court was sufficient to sustain the judgment

for the defendant.

It is therefore ordered that the judgment of the trial

court be affirmed.

JUDGMENT AFFIRMED.

BURKE, J. and KILBY, J., CONCUR.

43091

3241A. 523

BARBARA SATEK,
Appellant,

v.

ROSY FORTUNA et al.,
Appellees.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an action brought by plaintiff, Barbara Satek, to foreclose a trust deed on certain Chicago real estate owned by defendant, Rosy Fortuna. The case was referred to a master in chancery who found the issues in favor of plaintiff and recommended the entry of a decree of foreclosure and sale. The trial court sustained defendant's exceptions to the master's report, entered a decree dismissing the complaint for foreclosure for want of equity and entered judgment for \$617.18 against defendant, which amount the latter admittedly owed plaintiff. This appeal is prosecuted by plaintiff to reverse the decree. No question is raised on the pleadings.

There is no dispute as to the salient facts. The trust deed sought to be foreclosed was executed and delivered on December 1, 1927 by defendant and her husband (since deceased) to secure an indebtedness of \$10,000. This indebtedness was reduced to \$5,000 by December 1, 1937 and on that date an extension agreement was entered into between the defendant and Jos. C. Vlasak, Inc. (hereinafter for convenience the Vlasak company will be sometimes referred to as Vlasak) as agent of plaintiff, under the terms of which the balance of \$5,000 due on the mortgage was to be paid in the following installments: \$500 on December 1, 1938, \$500 on December 1, 1939, \$500 on December 1, 1940, \$500 on December 1, 1941 and \$3,000 on December 1, 1942. Interest was to be paid semiannually at the rate of 6% and ten extension interest coupons were executed.

43021

BARBARA BATEY,
Appellant,

v.

ROY PORTMAN et al.,
Appellees.

WASH. STATE COURT
COOK COUNTY.

MR. PRESIDING JUDGE BILLYE D. BROWN AND CLERK OF THE COURT.

This is an action brought by Barbara Batey, to foreclose a trust deed on certain real estate owned by defendant, Roy Portman. The deed was executed to a master in chancery who found the taxes in favor of Plaintiff and recommended the entry of a decree of foreclosure and sale. The trial court sustained defendant's exceptions to the master's report, entered a decree dismissing the complaint for foreclosure for want of equity and entered judgment for \$617.18 against defendant, which amount the latter admittedly owed plaintiff. This appeal is prosecuted by plaintiff to reverse the decree. No question is raised on the pleadings. There is no dispute as to the relevant facts. The first deed sought to be foreclosed was executed and delivered on December 1, 1925, by defendant and her husband (since deceased) to secure an indebtedness of \$10,000. This indebtedness was reduced to \$5,000 by November 1, 1931 and on that date an extension agreement was entered into between the defendant and Joe S. Alaska, Inc. (hereinafter for convenience the Alaska company will be sometimes referred to as Alaska) as agent of plaintiff, under the terms of which the balance of \$5,000 due on the mortgage was to be paid in the following installments: \$500 on December 1, 1932, \$500 on December 1, 1933, \$500 on December 1, 1934, \$500 on December 1, 1940, \$500 on December 1, 1941 and \$3,000 on December 1, 1942. Interest was to be paid semi-annually at the rate of 6% and ten extension interest coupons were

Joseph C. Vlasak carried on his real estate business under the corporate name of Jos. C. Vlasak, Inc., of which he was president. It is conceded that he acted as plaintiff's agent in executing the extension agreement and that he was authorized to receive the principal and interest payments when due under the terms of said extension agreement. Prior to October, 1941, defendant made all payments of principal and interest to Vlasak about the time they were due and he in turn paid such interest and installments of principal to plaintiff. When Vlasak received from defendant a payment of interest only he would notify plaintiff, she would send him the appropriate interest coupon and he would send her a check for the amount of interest paid less his commission. Upon his receipt of the paid interest coupon from plaintiff Vlasak would deliver same to defendant. When defendant made a payment of both principal and interest to Vlasak he would write plaintiff a letter notifying her to that effect, she would bring the interest coupon which had been paid to his office along with the principal note. He would pay her the interest and the installment of principal which he had received, she would turn over to him the interest coupon for delivery to defendant, he would indorse on the reverse side of the note the amount of principal paid and return said note to plaintiff.

About the middle of October, 1941, defendant's son called Vlasak on the telephone and told him that he wanted to pay the entire balance of the mortgage indebtedness, which amounted at that time to \$3,500. Vlasak told him that "he will have a talk with her [plaintiff] and if it is okay, why, he will let me know." Without having consulted plaintiff and without having been authorized by her to do so, Vlasak telephoned defendant's son the next day and said that plaintiff

Joseph C. Vlasak owned an interest in the business under the corporate name of J. C. Vlasak, Inc., of which he was president. It is contended that J. C. Vlasak, Inc. was authorized to execute the note and that he was agent in executing the note when it was made and he was authorized to receive the principal and interest payments when due under the terms of the note. It is contended that on October 1, 1941, defendant made a payment of principal and interest to Vlasak about the same time as the note was made and that such interest and principal payments were paid to plaintiff. When Vlasak received such payments, payment of interest only he would receive, but he would not receive the principal payments. The proceeds of interest would be paid to the bank for the amount of interest paid to the bank. For this receipt of the said interest coupon from plaintiff, Vlasak would deliver same to defendant. When defendant made a payment of both principal and interest to plaintiff, the plaintiff would deliver a letter notifying him to the bank, and would bring the interest coupon which had been paid to the bank to the plaintiff's bank. He would pay for the interest on the first payment of principal which he had received, and would turn over to him the interest coupon for delivery to defendant, he would indorse on the reverse side of the note the amount of principal paid and return said note to plaintiff.

About the middle of October, 1941, defendant's son called Vlasak on the telephone and told him that he wanted to pay the entire balance of the mortgage indebtedness, which amounted at that time to \$3,500. Vlasak told him that he will have a talk with her [plaintiff] and if it is okay, why, he will let me know. Without having consulted plaintiff and without having been authorized by her to do so, Vlasak telephoned defendant's son the next day and said that plaintiff

would only accept \$3,000 on account of principal at that time and that she would not accept the remaining \$500 of principal until "the complete mortgage expires" in December, 1942. On October 24, 1941 defendant's son, accompanied by her attorney, went to Vlasak's office and gave him a check for \$3,000 payable to the order of Joseph C. Vlasak, Inc. Before this check was delivered to Vlasak defendant's attorney asked him where the mortgage holder was and, when told that she was out of town, the attorney said that he was under the impression that she was supposed to be present. Defendant's attorney then caused the following memorandum to be typed on the back of the check: "to apply on the principal of Fortuna Mortgage Loan #6362." As heretofore stated, the check was made payable to Joseph C. Vlasak, Inc. A rubber stamp indorsement of the corporation was placed on it and Vlasak indorsed the check individually in blank in the presence of defendant's attorney and her son. Then Vlasak and said attorney prepared the following receipt, which was signed by Vlasak as president of the Vlasak corporation:

"Received of Stanley Fortuna Three Thousand and no/100 Dollars (\$3000.00), which is to apply on the principal of the FORTUNA MORTGAGE LOAN #6362 -

"It is also agreed and understood that the balance of \$500.00 remaining unpaid on this Mortgage will not be paid until the maturity of this loan on December 1st, 1942.

Joseph C. Vlasak, Inc.
Jos. C. Vlasak (Signed)
President.

Chicago, Illinois
October 24, 1941."

Plaintiff had no notice of the \$3,000 payment and same was never indorsed on the principal note. In December, 1941 Vlasak sent plaintiff the \$500 installment of principal and the interest then due under the terms of the extension agreement and in June, 1942 he sent her the full amount of interest due on

would only accept \$3,000 on account of principal at that time and that she would not accept the remaining \$700 of principal until "the complete mortgage expires" in December, 1942. On October 24, 1941 defendant's son, accompanied by her attorney, went to Vlasak's office and gave him a check for \$3,000 payable to the order of Joseph C. Vlasak, Inc. Before this check was delivered to Vlasak defendant's attorney asked him where the mortgage holder was and, when told that she was out of town, the attorney said that he was with the corporation that she was supposed to be present. Defendant's attorney then asked the following memorandum to be typed on the back of the check: "to apply on the principal of 'Tortum Mortgage Loan #362'." As heretofore stated, the check was made payable to Joseph C. Vlasak, Inc. A rubber stamp endorsement of the corporation was placed on it and Vlasak indorsed the check individually in blank in the presence of defendant's attorney and her son. Then Vlasak and said attorney presented the following receipt, which was signed by Vlasak as president of the Vlasak corporation:

Received of Tortum Mortgage Loan #362, which is to apply on the principal of the Tortum Mortgage Loan #362 - \$3,000.00, which is to apply on the principal of the Tortum Mortgage Loan #362 - \$700.00 remaining unpaid on this mortgage will not be paid until the maturity of this loan on December 1st, 1942.

"It is also agreed and understood that the balance of \$700.00 remaining unpaid on this mortgage will not be paid until the maturity of this loan on December 1st, 1942."

Joseph C. Vlasak, Inc.
Joseph C. Vlasak (Signed)
President

Chicago, Illinois
October 24, 1941.

Plaintiff had no notice of the \$3,000 payment and same was never indorsed on the principal note. In December, 1941 Vlasak sent plaintiff the \$700 installment of principal and the interest then due under the terms of the extension agreement and in June, 1942 he sent her the full amount of interest due on

that date under the terms of said agreement. Shortly after December 1, 1942, when the principal note as extended matured, plaintiff telephoned defendant and requested payment of the balance of \$3,000 and interest due on the mortgage and she learned then for the first time that defendant paid \$3,000 to Vlasak on October 24, 1941 and claimed that the balance due on the principal of the mortgage was only \$500. Vlasak, having paid plaintiff the \$500 installment of principal due on December 1, 1941 under the terms of the extension agreement out of the \$3,000 which he received from defendant on October 24, 1941, his net defalcation as of December 1, 1941 was \$2,500. In February, 1943 he delivered to plaintiff's attorney \$1,000 in cash, for which amount plaintiff gave defendant credit. Plaintiff's complaint to foreclose followed defendant's refusal to pay the balance of \$2,000 principal and the interest claimed to be due on the mortgage indebtedness. Plaintiff kept the trust deed, principal note and interest coupons in her safety deposit box and Vlasak never had them in his possession, even temporarily, except for the purposes and under the circumstances heretofore indicated.

Plaintiff's theory, as stated in her brief, is that "she is not bound by the act of an agent who, authorized to collect interest and principal payments under a mortgage, received \$2,500.00 in addition to the regular payments, prior to the maturity of the mortgage indebtedness. The defendant is not entitled to a credit on the mortgage indebtedness for the payment before maturity of the amount in excess of the actual payment of principal provided for in the mortgage extension agreement."

Defendant's theory is that "the agent in this transaction was the general agent of plaintiff and that he had either actual or apparent authority to collect the money. Our theory

that date under the terms of said agreement. Shortly after December 1, 1942, when the principal note as extended matured, plaintiff telephoned defendant and requested payment of the balance of \$2,500 and interest due on the mortgage and she learned then for the first time that defendant paid \$2,500 to Alaska on October 24, 1941 and claimed that the balance due on the principal of the mortgage was only \$700. Alaska, having paid plaintiff the \$2,500 installment of principal due on December 1, 1941 under the terms of the extension agreement out of the \$2,500 which he received from defendant on October 14, 1941, his net deduction as of October 1, 1941 was \$1,800. In February, 1942, he delivered to plaintiff's attorney \$1,000 in cash, for which amount plaintiff gave defendant credit. Plaintiff's complaint to defendant followed defendant's refusal to pay the balance of \$2,500 principal and the interest claimed to be due on the mortgage indebtedness. Plaintiff kept the trust deed, principal note and interest coupons in her safety deposit box and Alaska never had them in his possession, even temporarily, except for the purpose and under the circumstances heretofore indicated.

Plaintiff's theory, as stated in her brief, is that "she is not bound by the act of an agent who, authorized to collect interest and principal payments under a mortgage, received \$2,500.00 in addition to the regular payments, prior to the maturity of the mortgage indebtedness. The defendant is not entitled to a credit on the mortgage indebtedness for the payment before maturity of the amount in excess of the actual payment of principal provided for in the mortgage extension agreement."

Defendant's theory is that "the agent in this transaction was the general agent of plaintiff and that he had either actual or apparent authority to collect the money. Our theory

is that the payment in dispute was made in conformity with a custom and habit of dealing established between the parties and continued for over fourteen years and is binding upon plaintiff. We contend that the agent's acts and conduct were the result of actual authority or that his principal by her own acts appeared to give him such authority as he in fact exercised in this transaction. We contend that the plaintiff is therefore bound by the authority which she actually gave him and by that which by her own acts she appeared to give him."

After finding the facts substantially as heretofore set forth the master made the following further findings:

"Joseph C. Vlasak, Inc. had no implied or express authority to collect any part of the principal prior to its maturity.

"The owner and holder of a note secured by a trust deed is not bound by unauthorized payments before maturity and the payor is not justified in relying upon the representations made by an alleged agent when such alleged agent does not have possession of the note involved but the note remains in the hands of the owner who has no knowledge of the payment.

"An agent does not have authority to receive the principal, or any part thereof, prior to the time it becomes due without the express consent of such owner and holder of the note and trust deed.

"The evidence shows that at the time the payment of \$3,000.00 was made, the alleged agent was asked to produce the note, whereupon he stated that he did not have it, but that he would get it. This fact was sufficient to put the borrower upon notice and inquiry and showed a knowledge on the part of the defendant of what was required in order to make a good and valid payment. There was a duty on the part of the defendant to have demanded the note when the payment was made.

"It is a familiar rule of law that when a maker of a negotiable note makes payment thereon prior to the due date thereof, to a person who has not the note in his possession, he does so at his peril.

"It is the rule of law that an agent employed to negotiate a contract, or to collect interest and principal on the maturity dates, does not have, as an incident thereto, authority to receive payment prior to maturity.

is that the payment in dispute was made in conformity with a custom and habit of dealing established between the parties and continued for over fourteen years and its binding upon plaintiff. We contend that the agent's acts and conduct were the result of actual authority or that his principal by her own acts appeared to give him such authority as he in fact exercised in this transaction. We contend that the plaintiff is therefore bound by the authority which she actually gave him and by that which by her own acts she appeared to give him."

After finding the facts substantially as heretofore set forth the master made the following findings of fact: "Joseph C. Wisniewski, Inc. had no implied or express authority to collect any part of the principal prior to its maturity. "The owner and holder of a note secured by a trust deed is not bound by unauthorized payments before maturity and the payor is not justified in relying upon the representations made by an alleged agent who is not alleged to have possession of the note involved but the note remains in the hands of the owner who has no knowledge of the payment."

"An agent does not have authority to receive the principal, or any part thereof, prior to the time it becomes due without the express consent of such owner and holder of the note and trust deed."

"The evidence shows that at the time the payment of \$3,000.00 was made, the alleged agent was asked to produce the note, whereupon he stated that he did not have it, but that he would get it. This fact was sufficient to put the borrower upon notice and inquiry and showed a knowledge on the part of the defendant of what was required in order to make a good and valid payment. There was a duty on the part of the defendant to have demanded the note when the payment was made."

"It is a familiar rule of law that when a maker of a negotiable note makes payment thereon prior to the due date thereof, to a person who has not the note in his possession, he does so at his peril."

"It is the rule of law that an agent employed to negotiate a contract, or to collect interest and principal on the maturity dates, does not have, as an incident thereof, authority to receive payment prior to maturity."

"It is practically the universal custom to take up and cancel notes when they are paid, and for one who is authorized to collect, to have possession of the notes and be able to surrender them. Vlasak did not have possession of the note and it has uniformly been considered, under like circumstances, that there is no appearance of authority to make collection. Where an agent has possession of a note that is due, it may be inferred that he has authority to receive payment of it, but such authority could not be inferred from that fact in a case like this, where the payment was not due. The inference of authority to receive payment, arising under possession of a note, is founded upon possession and it does not exist without such possession.

"Where one of two innocent parties must suffer loss by reason of the wrongful acts of a third party, the rule is almost universal that the party who has made it possible, by reason of his negligence, for the third party to commit the wrong must stand the loss and in this case, the Master finds that the defendant, by not demanding the presentation and endorsement of the note, made it possible for the wrong to be committed and under the circumstances and facts must be held to suffer the loss in this cause."

The master also found that there was due plaintiff \$3,255.47, which included the balance due on principal, interest, the cost of "photostats," and attorneys' and stenographer's fees and recommended that in conformity with his findings and conclusions a decree of foreclosure and sale be entered. It was conceded upon the hearing in the trial court on the exceptions to the master's report that the total amount which said report should have found due to plaintiff was \$2,724.87 and that the error in the master's computation was due to his failure to allow defendant credit for the \$500 on account of principal which Vlasak remitted to plaintiff on December 1, 1941, ostensibly out of the \$3,000 which defendant paid him on October 24, 1941.

The law applicable to the facts in this case is clearly set forth in the master's report. There is not a particle of evidence in the record that Vlasak had any actual authority as plaintiff's agent to collect payments of principal on the note except as they became due under the terms of the extension agreement of December 1, 1937. Did he have any implied authority to do so? The answer must be in the negative because defend-

"It is practically the universal custom to take up and cancel notes when they are paid, and the holder is authorized to collect, to have possession of the notes and be able to surrender them. It is not his possession of the note and it has uniformly been considered, under like circumstances, that there is no question of authority to make collection. Where an agent has possession of a note, it may be inferred that he is authorized to receive payment of it, but such authority could not be inferred from the fact that in a case like this, the agent was not due. The inference of authority to receive payment, making under possession of a note, is founded upon the fact that it does not exist without such possession."

"Where one of two amounts paid a man a note for a reason of the loss of the note, the man is held almost universal that the party who made it possible, by reason of his negligence, for the other party to commit the wrong must stand the loss and in this case, the court finds that the defendant, by not canceling the note, was negligent in the endorsement of the note, and it is held that the wrong to be committed and the standard of care is the same as held to suffer the loss in this case."

The master also found that the defendant was negligent in failing to cancel the note, and in principal, interest, the loss of the note, and accordingly and accordingly. The master's fees and expenses were paid in conformity with his findings and conclusions and a decree of foreclosure and sale be entered. It was conceded upon the finding in the trial court on the exceptions to the master's report that the total amount which said report should have found to be principal was \$2,754.17 and the error in the master's computation was due to his failure to allow defendant credit for the 50c on account of principal which should have been allowed to plaintiff on December 1, 1941, ostensibly one of the \$1,000 which defendant paid him on October 24, 1941.

The law applicable to the facts in this case is clearly set forth in the master's report. There is not a particle of evidence in the record that Black had any actual authority as plaintiff's agent to collect payments of principal on the note except as they became due under the terms of the extension agreement of December 1, 1937. Did he have any implied authority to do so? The answer must be in the negative because defendant

ant's own evidence shows conclusively that plaintiff did not at any time clothe him with any appearance of authority to do other than collect the interest and installments of principal when due. Furthermore defendant is precluded from relying upon any implied authority in Vlasak to accept the payment of \$3,000 on account of principal before it became due because, according to her son's testimony, when he requested permission of Vlasak in October, 1941 to pay the entire balance of \$3,500 then due on the mortgage indebtedness, Vlasak plainly told him that he could not accept such payment without being directly authorized to do so by plaintiff. Thus defendant's son had direct and positive notice from Vlasak himself that he lacked authority to receive the payment in question without plaintiff's consent and when he paid the \$3,000 he did so, not relying upon any implied authority or appearance of authority in Vlasak to receive and accept same as plaintiff's agent but upon Vlasak's false statement that he contacted plaintiff and she expressly authorized him to receive the \$3,000. When this payment was made, defendant's attorney accompanied her son and neither of them demanded any evidence that plaintiff had authorized Vlasak to receive it but negligently relied solely on Vlasak's word for it.

The fact that defendant had notice and knowledge of Vlasak's limited authority is fatal to the defense interposed by her. So also is the fact that the payment of \$3,000 on account of principal was made in her behalf before maturity to an agent with limited authority, who did not at the time have possession of the principal note, interest coupons and trust deed. In Fortune v. Stockton, 182 Ill. 454, where the facts were somewhat comparable to the facts here, the court said at p. 462: "Where an agent has possession of a note that is due, it may be inferred that he has authority to receive

ant's own evidence shows conclusively that Plaintiff did not at any time clothe him with any appearance of authority to do other than collect the interest and installment of principal when due. Furthermore defendant is provided from a living upon any implied authority in Alaska to accept the payment of \$25,000 on account of principal before it has been received according to her agent's testimony, when he received possession of Alaska in October, 1941. The entire balance of \$25,000 then due on the mortgage and interest, Alaska's only title that he could not accept such a large amount directly authorized so to do by Plaintiff. That defendant's son had direct and positive notice that Alaska intended that he should authority to receive the payment in question. Plaintiff's consent and when he paid the \$25,000 he did so, not relying upon any implied authority or appearance of authority in Alaska to receive and accept same as Plaintiff's agent but from Alaska's false statement that he contacted Plaintiff in the explicitly authorized him to receive the \$25,000. When this agent was made, defendant's attorney, accompanied her son and witness of them demanded any evidence that Plaintiff had authorized Alaska to receive it not negligently relied solely on Alaska's word for it.

The fact that defendant had notice and knowledge of Alaska's limited authority is held to the defense introduced by her. So also is the fact that the payment of \$25,000 on account of principal was made in her behalf before maturity to an agent with limited authority, who did not at the time have possession of the principal note, interest coupons and trust deed. In Forstner v. Stockton, 132 Ill. 494, where the facts were somewhat comparable to the facts here, the court said at p. 482: "Where an agent has possession of a note that is due, it may be inferred that he has authority to receive

payment of it, but such an authority could not be inferred from that fact in a case like this, where the paper was not due." To the same effect is Bergstrom v. Colleran, 360 Ill. 377. As has been seen in the instant case, not only did Vlasak not have possession of the note but it was not yet due. In the Fortune case, as here, there was no appearance of authority and the party making the payment did not rely upon such.

The doctrine of implied or apparent authority is predicated upon appearance of authority which is due to the conduct of the principal. There was no such conduct on the part of the plaintiff herein. There was no reliance by defendant on the appearance of authority in Vlasak to accept her \$3,000 payment as the agent of plaintiff but rather upon his mere word after she had notice that he had no authority to accept such payment.

It is unfortunate that defendant must suffer loss by reason of Vlasak's dishonesty but it would be even more unfortunate if plaintiff, who was in no wise at fault, was compelled to bear the loss. The law is well settled that as between two innocent parties the one whose negligence made possible the damage must bear the loss.

It is idle to urge that plaintiff's acceptance of the \$1,000, which her attorney received from Vlasak after the maturity of the mortgage, constituted a ratification of his unauthorized conduct. Plaintiff gave defendant credit for this \$1,000 payment by Vlasak and it was her duty to accept it in order to mitigate defendant's damages.

It is contended that plaintiff should be allowed \$600 rather than \$450 as attorneys' fees, which latter amount the master found she was entitled to receive. We think that under all the circumstances \$450 is a fair and reasonable allow-

ance.

We are impelled to hold that the master's conclusions as to the facts and the law applicable to such facts were correct and that the chancellor erred in sustaining defendant's exceptions to the master's report and entering a decree dismissing plaintiff's complaint to foreclose for want of equity.

For the reasons stated the decree of the Circuit court of Cook county is reversed and the cause is remanded with directions to enter a decree of foreclosure and sale in accordance with the recommendations of the master, subject only to the correction noted herein as to the amount due plaintiff.

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Friend and Scanlan, JJ., concur.

ance.

We are impelled to hold that the master's conclusions

as to the facts and the law applicable to such facts were

correct and that the chancellor acted in sustaining the

and's exceptions to the master's report and entering a decree

dismissing plaintiff's complaint to foreclose for want of

equity.

For the reasons stated the decree of the Circuit

Court of Cook County is reversed and the case is remanded

with directions to enter a decree of foreclosure and sale

in accordance with the recommendations of the master, and

cost only to the party who has been found to be wrong.

Due plaintiff.

W. C. HARRIS, JR.,
Circuit Court of Cook County.

Friend and General, Ill., Chicago.

43118

324 I.A. 323

IN THE MATTER OF THE ESTATE OF
ZYGMUNT KLOCKOWSKI, Deceased.

JOAN WACLAWSKI, Objector below,
Appellant,

v.

ELENORA KLOCKOWSKI and ANTONIA
WOLCZEK, Administratrices of the
estate of Zygmunt Klockowski,
Deceased,
Appellees.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED OPINION OF THE COURT.

Zygmunt Klockowski died intestate on July 9, 1943, leaving surviving him his widow, Elenora Klockowski, and two children by a former marriage, Joan Wacławski and Edwin Klockowski. On September 15, 1941 the decedent lent \$3,800 to Walter Radzwilowicz, the son of Elenora Klockowski by a former marriage, and as security for the payment of said loan Walter Radzwilowicz and his wife, Clementine Radzwilowicz, executed and delivered to decedent a first mortgage installment note for \$3,800 and a trust deed. Proceedings to probate the estate of Zygmunt Klockowski were instituted in the probate court and the inventory filed by the administratrices listed said mortgage note as belonging to the decedent's estate. His daughter, Joan Wacławski (hereinafter sometimes referred to as the objector), filed objections to the inventory, asserting that the administratrices wrongfully included therein the aforesaid first mortgage note as an asset belonging to the estate of Zygmunt Klockowski; that the first mortgage note and the trust deed securing same were the property of herself and her husband; and that they were not the property of the decedent at the time of his death. After a hearing on said objections the probate court entered an order which found and

IN THE MATTER OF THE ESTATE OF
EUGENIE KLOKOWSKI, Deceased.

JOHN WACHAWSKI, Objector below,
Appellant,

ELIZABETH KLOKOWSKI and
WOLFF, Administrators of the
estate of Eugene Klokowski,
Deceased,

Defendants.

MR. PRESIDING JUDGE

Eugenie Klokowski died intestate on July 7, 1943.

leaving surviving him his widow, Elizabeth Klokowski, and two

children by a former marriage, John Wachowski and Helen

Klokowski. On September 1, 1941 the decedent lent \$2,500

to Walter Radziewicz, the son of Elizabeth Klokowski by a

former marriage, and as security for the payment of said loan

Walter Radziewicz and his wife, Clementine Radziewicz,

executed and delivered to decedent a first mortgage installment

ment note for \$2,500 and a trust deed. Proceedings to probate

the estate of Eugene Klokowski were instituted in the probate

court and the inventory filed by the administrators listed

said mortgage note as belonging to the decedent's estate. His

daughter, Joan Wachowski (hereinafter sometimes referred to as

the objector), filed objections to the inventory, asserting

that the administrators wrongfully included therein the

aforesaid first mortgage note as an asset belonging to the

estate of Eugene Klokowski; that the first mortgage note

and the trust deed securing same were the property of herself

and her husband; and that they were not the property of the

decedent at the time of his death. After a hearing on said

objections the probate court entered an order which found and

adjudged that the first mortgage note and the trust deed involved herein were the property of Joan Waclawski and her brother Edwin Klockowski at the time of the death of their father, Zygmunt Klockowski. An appeal was perfected from the order of the probate court to the circuit court, where a trial was had before the court and a jury. The jury returned a verdict finding that "the property in question belonged to the petitioner, Joan Waclawski at the time of the death of Zygmunt Klockowski." On motion of the administrators of the estate judgment was entered in their favor finding "the said note and mortgage in question the property of Zygmunt Klockowski, at the time of his death notwithstanding the verdict of the jury." The objector, Joan Waclawski, appeals from the judgment order of the circuit court.

The theory of the objector as stated in her brief is that "her father, Zygmunt Klockowski, the decedent, made and completed a gift causa mortis of the note and mortgage to her and her brother, Edwin Klockowski, and by reason thereof said property does not constitute a part of the Estate of the decedent." In the objections filed to the inventory Joan Waclawski claimed that her father made the gift of the note and trust deed to her and her husband. The probate court found and adjudged that the gift was made to her and her brother. The jury in the circuit court found that the gift was made to her alone. In her theory as stated in her brief, she claims the gift was made to her and her brother. For convenience we will consider that her claim is that the gift was made to her personally.

In the case of In re Estate of Meyer, 317 Ill. App. 96, in pointing out the essential elements of a gift causa mortis the court said at p. 101:

"There are three requisites necessary to constitute a donatio causa mortis: 1. the gift must be with a view to the

adjudged that the first mortgage note and the trust deed involved herein were the property of Joan Waelawski and her brother Edwin Klockowski at the time of the death of their father, Zygmunt Klockowski. An appeal was granted from the order of the Probate Court to the Circuit Court, where a trial was had before the Court and a jury. The jury returned a verdict finding that "the said note and mortgage belonged to the petitioner, Joan Waelawski, at the time of the death of Zygmunt Klockowski." On motion of the defendant-trustees of the estate judgment was entered in their favor finding "the said note and mortgage in violation of the property of Zygmunt Klockowski, at the time of his death notwithstanding the verdict of the jury." The defendant, Joan Waelawski, appeals from the judgment order of the Circuit Court.

The theory of the objection as stated in her brief is that "her father, Zygmunt Klockowski, the defendant, made and completed a gift inter vivos of the note and mortgage to her and her brother, Edwin Klockowski, and by reason thereof said property does not constitute a part of the estate of the decedent." In the objections filed by the defendant Joan Waelawski claimed that her father upon the life of the note and trust deed to her and her brother. The probate court found and adjudged that the gift was made to her and her brother. The jury in the Circuit Court found that the gift was made to her alone. In her theory as stated in her brief, she claims the gift was made to her and her brother. For convenience we will consider that her claim is that the gift was made to her personally.

In the case of In re Estate of Meyer, 317 Ill. App. 96, in pointing out the essential elements of a gift inter vivos the court said at p. 101:

"There are three requisites necessary to constitute a

donor's death; 2. it must have been made to take effect only in the event of the donor's death by his existing disorder; 3. there must be an actual delivery of the subject of the donation. (Telford v. Patton, 144 Ill. 611; Williams v. Chamberlain, 165 Ill. 210.)"

In passing upon a motion for judgment notwithstanding the verdict both this court and the trial court must be governed by the same rules that apply to a motion for a directed verdict. In Merlo v. Public Service Co., 381 Ill. 300, the court said at p. 311:

"These motions present only a question of law as to whether, when all of the evidence is considered, together with all reasonable inferences from it in its aspect most favorable to the plaintiffs, there is a total failure or lack of evidence to prove any necessary element of the plaintiffs' case. If there is any evidence tending to sustain every element of the plaintiffs' case necessary to be proved to sustain the cause of action, it is immaterial upon which side the evidence is introduced. No contradictory evidence or other evidence of any kind or character will, in such case, justify a directed verdict or a judgment notwithstanding the verdict, except uncontradicted evidence of facts consistent with every fact which the evidence for the plaintiff tends to prove, but showing affirmatively a complete defense. (Nelson v. Stutz Chicago Factory Branch, Inc., 341 Ill. 387.) This requires consideration of the evidence, but precludes any examination of the weight of the evidence in order to determine its preponderance. It is wholly immaterial on which side the weight of the evidence preponderates."

We deem it necessary to consider only the question as to whether there was a total lack of evidence to prove the essential element of delivery of the property in question to Joan Waclawski by her father during his lifetime and this question must be viewed in the light of the foregoing rules.

The objector herself testified that she had the note and trust deed in her possession the day after her father's death and for some time thereafter. Anthony Krusienski testified in her behalf that he drove the decedent to a hospital about 12 days before he died; that Joan Waclawski and her husband accompanied her father; that on the way to the hospital he saw the decedent hand his daughter a blue envelope but he did not know or see what was in it; that when her father handed the envelope to Joan Waclawski he said: "Here is for you *** here

donor's death; 2. it must have been made to take effect only in the event of the donor's death by his existing disability; 3. there must be an actual delivery of the subject of the donation. (Leford v. Patton, 144 Ill. 611; Williams v. Chamberlain, 165 Ill. 210.)

In passing upon a motion for judgment notwithstanding the verdict both this court and the trial court must be governed by the same rules that apply to a motion for a directed verdict. In Merlo v. Public Service Co., 241 Ill. 301, the court said at p. 311:

"These motions present only a question of law as to whether, when all of the evidence is considered, whether with all reasonable inferences drawn from it in its aspect most favorable to the plaintiff, there is a total failure or lack of evidence to prove any necessary element of the plaintiff's case. If there is any evidence tending to sustain any element of the plaintiff's case necessary to be proved to sustain the cause of action, it is the duty of the court to allow the evidence to be introduced. No contradictory evidence or other evidence of any kind or character, in any case, justifies a directed verdict or a judgment notwithstanding the verdict, except when contradicted evidence of facts consistent with every fact which the evidence for the plaintiff tends to prove, but showing affirmatively a complete defense. (Williams v. State Oil Co., 165 Ill. 210, 241 Ill. 301.) This requires consideration of the evidence, but requires any examination of the weight of the evidence in order to determine its preponderance. It is wholly immaterial on which side the weight of the evidence preponderates."

We deem it necessary to consider only the question as to whether there was a total lack of evidence to prove the essential element of delivery of the property in question to Joan Walsawski by her father during his lifetime and this question must be viewed in the light of the foregoing rules.

The objector herself testified that she had the note and trust deed in her possession the day after her father's death and for some time thereafter. Anthony Krukowski testified in her behalf that he drove the decedent to a hospital about 12 days before he died; that Joan Walsawski and her husband accompanied her father; that on the way to the hospital he saw the decedent hand his daughter a blue envelope but he did not know or see what was in it; that when her father handed the envelope to Joan Walsawski he said: "Here is for you *** here

is for you Joan and Eddie. If something happen to me then it is going to be for you and Eddie"; that the decedent knew that he was going to the hospital and he also said, "Maybe I never come back"; and that later that night he saw Joan Wacławski "have the note and trust deed with her in the hospital." The objector's husband testified that he saw the note and trust deed in his wife's possession after his father-in-law died. The foregoing comprises all the evidence in the record that could possibly have any bearing on the question as to whether the note and trust deed were delivered as a gift to the objector by her father during his lifetime.

Since there is no presumption of delivery or ownership because of the objector's mere possession of the note and trust deed either before or after her father's death, her sole reliance must necessarily be on the testimony of Krusienski as to the claimed delivery of said note and trust deed to her by her father before he died. Krusienski testified that he saw the decedent hand his daughter a blue envelope in the automobile and that he did not know or see what, if anything, was in it. The fact that her father handed an envelope to her in the automobile under the circumstances testified to by Krusienski, considered by itself, neither proves nor tends to prove, nor can any legitimate inference be drawn therefrom, that he delivered the note and trust deed to the objector at that time. The fact that the objector had the note and trust deed in her possession later that same night at the hospital, considered alone, neither proves nor tends to prove, nor can any reasonable inference be drawn therefrom, that the decedent delivered them to her during his lifetime. Since there is neither direct nor circumstantial evidence that the note and trust deed which she had in her possession that night were contained in the envelope which the objector was given by her father in the automobile, can it be

legitimately inferred that they were? We think not. Krusienski did not see them in a blue envelope or in any envelope and he did not see her take them out of a blue envelope or out of any envelope.

In our opinion it cannot be legitimately inferred that the note and trust deed which Joan Wacławski had in her possession that night, according to the testimony of Krusienski, were in the envelope which her father handed to her in the automobile, in the absence of evidence of some fact or circumstance which shows or tends to show that they were. A reasonable and legitimate inference can only be deduced from evidence. To say that the note and trust deed which the objector had in her possession in the hospital that night were in the envelope which her father handed her in the automobile on the way to the hospital earlier that evening would be merely to guess or conjecture that they were.

The motion heretofore made to strike the report of proceedings from the record and to dismiss the objector's appeal, which was reserved to hearing, will be denied.

We are impelled to hold that the objector wholly failed to prove that her father delivered the note and trust deed to her during his lifetime and that, since delivery is one of the essential elements of a gift causa mortis, the trial court did not err in entering judgment in favor of the administratrices of the estate notwithstanding the verdict of the jury.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Friend and Scanlan, JJ., concur.

legitimately inferred that they were? It seems not. Inasmuch as

did not see them in a blue envelope or in any envelope and he

did not see her take them out of a blue envelope or out of any

envelope.

In our opinion it cannot be reasonably inferred that

the note and trust deed which John, deceased had in his possession

that night, according to the testimony of the witnesses, were in

the envelope which her father handed to her in the automobile,

in the absence of evidence of some kind or direct evidence which

shows or tends to show that they were, or otherwise and legit-

imate inference can only be deduced from evidence, so that that

the note and trust deed which the defendant had in his possession

in the hospital that night were in the envelope which her father

handed her in the automobile on the way to the hospital, rather

than that evening would be merely to show that they

were,

The action hereof was made to give the report of pro-

ceedings from the record and to furnish the opposite party,

which was reserved to decide, all or denied.

We are inclined to hold that the evidence fully failed

to prove that her father delivered the note and trust deed to

her during his lifetime and that, which delivery is one of the

essential elements of a gift under the law, the trial court did

not err in entering judgment in favor of the estate, and the

of the estate notwithstanding the verdict of the jury.

The judgment of the Circuit Court of Cook County is

affirmed.

JOHN J. LEWIS, JUDGE.

42432

J. LITWIN,
(plaintiff) Appellant,

v.

HALSEY, STUART & CO., INC.,
a corporation, et al.,
Defendants.

R. P. MATTHIESSEN, HAMILTON
ALLPORT, GEORGE H. ARNOLD
and FRANCIS M. BROOKE,
Members of the Bondholders'
Protective Committee for the
Steuben Building,
(defendants) Appellees.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

32-1-A-524

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This cause came up on appeal with case No. 42923, wherein an opinion is being concurrently filed. The facts are sufficiently stated in that proceeding and need not here be repeated. The original complaint, referred to in plaintiff's brief as the first count, sought relief against both Halsey, Stuart & Company and the other defendants herein, as members of the bondholders' protective committee of the Steuben Building. Motions of Halsey, Stuart & Company and the defendant committee members to strike the original complaint were both sustained, and no appeal was taken from that order. Thereafter plaintiff had leave to file the second and third counts. The second count sought relief only against Halsey, Stuart & Company, which was required to answer, but the motion of the remaining defendants against it was sustained. The third count sought relief against the individual defendants, but none against Halsey, Stuart & Company. Motions of the respective defendants to dismiss were sustained with respect to that count. The question therefore presented by this appeal is whether the third count sufficiently stated a cause of action against the defendants who were members of the

J. LITWIN,
(Plaintiff) Appellant,

v.

HALEY, STUART & CO., INC.,
a corporation of the
State of New York,

Defendants.

R. P. MATTHEWS, JR.,
ALBERT A. MATTHEWS,
and LEO A. MATTHEWS,
Members of the Board of Directors
Protective Committee for the
Stephen Building,
(Defendants) Appellees.

MR. JUSTICE BRIDGES delivered the opinion of the court.

This case came up on appeal with case No. 42432.

wherein an opinion is being concurrently filed. The facts

are sufficiently stated in that proceeding and need not

here be repeated. The original complaint, referred to in

plaintiff's brief as the first count, sought relief against

both Haley, Stuart & Company and the other defendants here-

in, as members of the board of directors, protective committee of

the Stephen Building. Motions of Haley, Stuart & Company

and the defendant committee members to strike the original

complaint were both sustained, and no appeal was taken from

that order. Thereafter plaintiff had leave to file the second

and third counts. The second count sought relief only against

Haley, Stuart & Company, which was required to answer, but

the motion of the remaining defendants against it was sus-

tained. The third count sought relief against the individual

defendants, but none against Haley, Stuart & Company. Motions

of the respective defendants to dismiss were sustained with

respect to that count. The question therefore presented by

this appeal is whether the third count sufficiently stated a

cause of action against the defendants who were members of the

bondholders' protective committee.

With respect to these defendants, the third count alleges that they were organized as a committee by Halsey, Stuart & Company for the alleged protection of the interests of the bondholders after default occurred in the payments of principal and interest on the bond issue; that plaintiff collected interest on his bonds up to the coupon which matured September 1, 1930, when he received a communication from the committee stating that it was necessary for the protection of the bondholders and for the purpose of taking concerted action in their interest to deposit the bonds with the Depositary of the Committee, to safeguard and protect the interests of the bondholders; that having full faith and confidence in the Foreman Bank, which acted as depositary, and believing that the members of the committee were working in good faith for the protection and preservation of the interests of the bondholders, he deposited his bonds with the depositary, and certificate of deposit was thereupon issued to him; that subsequently he received communications from the committee from time to time stating, in substance, that there was not sufficient income to cover operating expenses and taxes and that it would be useless to offer any reorganization plans; and that no reorganization plan was ever promulgated by the committee; that the committee represented that it was formed for the protection of the depositors and for the purpose of taking united action for their common benefit, and to enforce in their behalf their rights and remedies; that it became the duty of the members of the committee to assert their remedies in favor of the depositors; that while the causes of action against Halsey, Stuart & Company were known to the members of the committee, due to the fact that the chairman thereof was an officer of Halsey, Stuart & Company and knew all the facts,

bondholders' protective committee.

With respect to these defendants, the claim count alleged that they were organized as a committee by Halsey, Stuart & Company for the alleged protection of the interests of the bondholders after default occurred in the payment of principal and interest on the bond issue; that plaintiff collected interest on his bonds up to the date on which he received a notice to surrender the bonds from the committee stating that it was necessary for the protection of the bondholders and for the purpose of taking concerted action in their interest to require the bondholders to deposit with the committee, to safeguard and protect the interests of the bondholders; that in the fall of 1911 and during the time in the foreman's office, which acted as a repository, and believing that the members of the committee were, acting in good faith for the protection and preservation of the interests of the bondholders, he deposited his bonds with the repository, and certificates of deposit was thereupon issued to him; that subsequently he received communications from the committee from time to time stating, in substance, that there was not sufficient income to cover operating expenses and taxes and that it would be useless to offer any reorganization plans; and that no reorganization plan was ever promulgated by the committee; that the committee represented that it was formed for the protection of the depositors and for the purpose of taking united action for their consolidation, and to enforce in their behalf their rights and remedies; that it became the duty of the members of the committee to assist their remedies in favor of the depositors; that while the cause of action against Halsey, Stuart & Company was known to the members of the committee, and to the fact that the chairman thereof was an officer of Halsey, Stuart & Company and knew all the facts,

nevertheless the committee took no action to protect the rights and interests of the depositors; that Halsey, Stuart & Company interposed the Statute of Limitations as a defense, and if such defense were to be successfully maintained the depositors would sustain loss by reason of the failure of the committee to institute the causes of action before the expiration of the statutory period of limitations and could not recover anything against Halsey, Stuart & Company; that the members of the committee should therefore be personally charged with the loss caused by their "gross negligence"; that it was the duty of the members of the committee either to cause the actions to be commenced or to inform the depositors of the existence of the cause of action so that they might avail themselves of their remedies and to return their bonds to them in order to enable them to maintain such actions; that because the committee was the instrumentality of Halsey, Stuart & Company and organized, not for the purpose of protecting the depositors but for the purpose of protecting its "master," Halsey, Stuart & Company, and to deprive the investors of their rights and remedies, it did not commence such action; that the depositors have taken no action themselves, as the causes of action were unknown to them; that the members of the committee should therefore be held liable in equity for their violation of their trust duties and obligations and for their misconduct; that the committee should be removed and competent persons appointed by the court to supersede the committee members; that the members should be directed to deliver the list of names and addresses of the depositors to designated persons, who might communicate with them and inform them of the pendency of this suit and call a meeting of the depositors for the purpose of appointing a competent committee to act in their behalf. The following relief was sought against these defendants: (1) that the

nevertheless the committee took no action to protect the rights and interests of the depositors; that Messrs. Trust Company imposed the statute of limitations as a defense, and if such defense were to be successfully maintained the depositors would sustain loss by reason of the failure of the committee to in-

stitute the cause of action before the expiration of the statutory period of limitations and could not recover anything against Messrs. Trust Company; that the members of the committee should therefore be personally charged with the loss caused by their "gross negligence"; that it is the duty of the

members of the committee either to cause the action to be commenced or to inform the depositors of the existence of the cause of action so that they might avail themselves of their remedies and to retain their bonds to them in order to enable them to maintain such action; that because the committee was the instrumentality of Messrs. Trust Company and organized,

not for the purpose of protecting the depositors but for the purpose of protecting the "master," Messrs. Trust Company, and to deprive the investors of their rights and remedies, it did not commence such action; that the depositors have taken no action themselves, as the cause of action were unknown to them; that the members of the committee should therefore be

held liable in equity for their violation of their trust duties and obligations and for their misconduct; that the committee should be removed and competent persons appointed by the court to supersede the committee members; that the members should be

directed to deliver the list of names and addresses of the depositors to designated persons, who might communicate with them and inform them of the pendency of this suit and call a

meeting of the depositors for the purpose of appointing a competent committee to act in their behalf. The following

relief was sought against these defendants: (1) that the

court should find that a valid cause of action existed against Halsey, Stuart & Company, and that it was the duty of these defendants to institute this cause of action within a reasonable time after the bonds were deposited with it, which cause of action was not commenced, and that the members of the committee therefore violated their trust duties and obligations and became liable therefor; (2) that if the court should sustain the defense of the Statute of Limitations in behalf of Halsey, Stuart & Company, it should nevertheless find, in the alternative, that these defendants became liable and are accountable to the bondholders for the loss and damage caused by the failure to commence the action within the proper time, and that a judgment be rendered against them in such amount as the court might find due upon a final accounting; (3) that the court should hold that the committee was not a bona fide protective committee but was the instrumentality of Halsey, Stuart & Company, that its position was adverse to the interests of the bondholders, that the committee members should therefore be removed from office and suitable persons appointed to supersede them, and that defendants be directed to furnish a list of names and addresses of all bondholders to a person or persons designated by the court; (4) that a meeting be called under the supervision of an appointee of the court to elect a proper bondholders' committee; and (5) that the court should find and determine that the members of the committee were guilty of a violation of trust duties and obligations and accountable to the depositors, the beneficiaries of the trust, in such amount or amounts as the court should find and determine to be due from each of them.

It thus appears that the essence of the third count is that these defendants failed to institute a suit against Halsey, Stuart & Company in behalf of plaintiff and others. We held

mine to be due from each of them.

in such amount or amounts as the court should find and deter-
accountable to the depositors, the beneficiaries of the trust,
guilty of a violation of trust duties and obligations and
find and determine that the members of the committee were
proper bondholders' committee; and (5) that the court should
under the supervision of an appointee of the court to elect a
persons designated by the court; (4) that a meeting be called
of names and addresses of all bondholders to a person or
sede them, and that defendants be directed to furnish a list
removed from office and suitable persons appointed to super-
bondholders, that the committee members should therefore be
Company, that its position was adverse to the interests of the
committee but was the instrumentality of Halsey, Stuart &
should hold that the committee was not a bona fide protective
might find due upon a final accounting; (3) that the court
judgment be rendered against them in such amount as the court
to commence the action within the proper time, and that a
the bondholders for the loss and damage caused by the failure
that these defendants become liable and are accountable to
& Company, it should nevertheless find, in the alternative,
tense of the Statute of Limitations in behalf of Halsey, Stuart
liable therefor; (2) that if the court should sustain the de-
therefore violated their trust duties and obligations and became
action was not commenced, and that the members of the committee
time after the bonds were deposited with it, which cause of
defendants to institute this cause of action within a reasonable
Halsey, Stuart & Company, and that it was the duty of these
court should find that a valid cause of action existed against

Stuart & Company in behalf of plaintiff and others. We held that these defendants failed to institute a suit against Halsey, it thus appears that the essence of the third count is

in case No. 42923 that whatever cause of action plaintiffs may have had against Halsey, Stuart & Company was barred both by the Statute of Limitations and by laches. If it be assumed that the allegations of the third count state a cause of action against the individuals who constituted the bondholders' committee because of their failure to institute a suit against Halsey, Stuart & Company, it is nevertheless clear upon the face of the count that the cause of action arose in 1930 and was therefore barred by the Statute of Limitations or by the laches of plaintiff, who did not institute proceedings until 1941. To avoid the effect of the Statute of Limitations or laches, plaintiff alleged concealment of the cause of action, and evidently relies on the provisions of section 23, chapter 83, Ill. Rev. Stat. 1941, which provides that if a person liable to an action fraudulently conceals the facts from the knowledge of the person entitled to them, suit may be instituted at any time within five years after the person entitled to bring it discovers that he has a cause of action. However, count 3 does not specifically allege any facts of concealment by these defendants. Under section 23 the fraudulent concealment must be something more than mere silence or failure to disclose and must consist of affirmative acts of a sort not alleged in the count.

In Keithley v. Mutual Life Ins. Co., 271 Ill. 584 (affirming 191 Ill. App. 317), the action was for fraud and deceit, and the declaration consisted of two counts. The case was disposed of upon demurrers which were sustained to the second count and to a replication to a plea of the five years' Statute of Limitations to the first count. It was there held that such an action must be begun within five years after the cause of action accrued unless there has been a fraudulent concealment of the cause of action within

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In Keightley v. Mutual Life Ins. Co., 271 Ill. 584 (affirmed 191 Ill. App. 217), the action was for fraud and deceit, and the declaration consisted of two counts. The case was disposed of upon demurrers which were sustained to the second count and to a replication to a plea of the five years' statute of limitations to the first count. It was there held that such an action must be begun within five years after the cause of action accrued unless there has been a fraudulent concealment of the cause of action within

the meaning of the applicable section of the Statute of Limitations. In defining what is meant by fraudulent concealment of the cause of action the court referred to Beatty v. Nickerson, 73 Ill. 605, wherein it was held that the representations charged in the declaration to be false and fraudulent, did not meet the requirements of the statute because they failed to set out the facts constituting the concealment, and that a reference to the declaration did not supply the defect because in the declaration there was no allegation of concealment or of acts tending fraudulently to conceal a cause of action. Parmalee v. Price, 208 Ill. 544, Lancaster v. Springer, 239 Ill. 472, and Vigus v. O'Bannon, 118 Ill. 334, were also cited and discussed, and the court concluded that "The doctrine announced in these decisions is, that the fraudulent concealment of a cause of action which will prevent the running of the Statute of Limitations must be some affirmative act or representation intended to prevent the discovery of the cause of action, which does actually prevent such discovery; that a replication setting up such fraudulent concealment must set out the facts constituting the concealment; that the fraudulent misrepresentations which form the basis of the cause of action do not constitute a fraudulent concealment in the absence of allegations of acts or representations tending fraudulently to conceal the cause of action; that the rule that the statute begins to run only from the discovery of the fraud does not apply when the party affected by the fraud might with ordinary diligence have discovered it; ***" Later, in Skrodzki v. Sherman State Bank, 348 Ill. 403, the court, relying on Keithley v. Mutual Life Ins. Co. and decisions cited therein, followed the same rule and affirmed the Appellate court in holding that plaintiff had not discharged the burden resting upon him to prove fraudulent concealment of the cause of action so as to toll the running of the Statute of

the meaning of the applicable section of the statute of limitations. In defining what is meant by fraudulent concealment of the cause of action the court referred to *Wright v. Johnson*, 73 Ill. 605, wherein it was held that if a person is charged in the declaration to be false and the facts are not met the requirements of the statute require only that he set out the facts constituting the concealment, and that the facts in response to the declaration will not be by the effect of the facts in the declaration there was no allegation of concealment of facts tending to conceal the cause of action. *Wright v. Johnson*, 73 Ill. 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Limitations (affirming 261 Ill. App. 16.)

In this appeal, as in the appeal in cause No. 42923, plaintiff argues, in the alternative, that if his cause of action is barred by the Statute of Limitations, he is nevertheless entitled to recover in equity; but, as already pointed out in our other opinion, the rule is well settled in Illinois that where plaintiff elects to sue in equity on a cause of action for fraud and deceit for which there is also a concurrent remedy at law, equity does not merely follow the analogy of the Statute of Limitations but applies it as an absolute bar. Sloan v. Graham, 85 Ill. 26; Bonney v. Stoughton, 122 Ill. 536; and Harding v. Durand, 138 Ill. 515.

Various other questions are raised by this appeal, but we think that our conclusion as to the insufficiency of the third count and our holding that the cause of action therein sought to be alleged is barred either by limitations or laches, or both, are determinative of the principal issues involved. We therefore hold that the chancellor properly dismissed the third count, and accordingly the order appealed from is affirmed.

ORDER AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

limitations (affirming 201 Ill. 2d 100)

In this appeal, as in the appeal in 201 Ill. 2d 100, plaintiff argues, in the alternative, that in the case of action is barred by the statute of limitations, it is nevertheless entitled to recover the value of the property, retained out in our other opinion, this case is well settled in Illinois that where plaintiff objects to an action on a statute of limitations for time and merit for which there is a good current remedy at law, equity does not require dismissal. The analogy of the statute of limitations in Illinois is an absolute bar. Ill. v. Sullivan, 201 Ill. 2d 100, 101. Ill. v. Sullivan, 201 Ill. 2d 100, 101. Ill. v. Sullivan, 201 Ill. 2d 100, 101.

215.

Various other questions are raised in this appeal, but we think that our conclusion as to the limitations of the third count and our holding as to the first and second therein ought to be sufficient to dispose of the questions or issues, or both, and therefore of the principal issues involved. We therefore hold that the third count properly dismissed the third count, and as ordering the order appealed from is affirmed.

JUSTICE

Sullivan, J., and Coleman, J., concur.

42923

324 I.A. 525¹

J. LITWIN and C. F. KUHLOW,
Appellants,

v.

HALSEY, STUART & CO., INC.,
a corporation, et al.,
Appellees.

)
)
) APPEAL FROM SUPERIOR
)
) COURT, COOK COUNTY.
)
)

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiffs, as owners respectively of \$7,000 and \$1,000 of bonds of an issue of \$3,500,000 on the Steuben Building, Chicago, sought by this proceeding to hold Halsey, Stuart & Company, Inc., and four members of the Bondholders' Protective Committee, liable for fraudulent misrepresentations made to them in the sale of bonds, for breaches of trust growing out of an alleged fiduciary relationship, and for an accounting. The chancellor dismissed the complaint and the several counts thereof against the four individual defendants, and that matter is now involved in a separate appeal pending in case No. 42432. He also dismissed the first and third counts of the complaint but ordered Halsey, Stuart & Company, the only remaining defendant, to answer the second count. The defense interposed consisted of a denial of the material allegations of count 2, a denial of the alleged trust relationship, and the affirmative defense of the Statute of Limitations and laches as a bar to plaintiffs' recovery. The matter was then referred to a master in chancery, before whom an exhaustive hearing was had. Briefs were filed touching upon the legal questions involved, and arguments had thereon. The master found, in effect, that certain material representations made in a prospectus published by Halsey Stuart & Company were fraudulent, untrue and calculated to deceive the investors who relied on the representations; but he concluded, as a matter of law, that defendant never became the trustee of any

funds for the use and benefit of the bondholders, and that the Statute of Limitations constituted a bar to plaintiffs' recovery. On exceptions to the master's report the chancellor found that defendant was not a trustee and therefore not guilty of any breach of trust; that plaintiffs were not entitled to any accounting, either on the ground of trust or fraud; and that plaintiffs were barred from maintaining any action because of the intervention of the Statute of Limitations and of laches. He accordingly dismissed the complaint for want of equity, at plaintiffs' costs. Plaintiffs have taken an appeal from the decree entered.

Without setting forth the lengthy pleadings filed herein, we think a comprehensive understanding of the issues involved may be had from the material findings of the master, as follows: It appears that on May 17, 1927 an agreement was entered into between the Steuben Club, as purchaser, and Chicago Title and Trust Company, trustee, as seller, for the sale of the premises upon which the Steuben Club Building was later erected at a price of \$1,500,000, subject to the 1927 taxes, of which the seller agreed to pay one-third. The purchaser paid \$50,000, and the balance was to be paid in installments bearing interest at 6 per cent from May 1, 1927, and when the aggregate sum of \$500,000 had been paid the seller was to take a mortgage of \$1,000,000.

Thereafter, on November 23, 1927, an agreement was entered into between the Steuben Club, a corporation not for profit, and Halsey, Stuart & Company, Inc. (which is referred to as "purchaser" throughout the entire agreement). It contained a copy of the contract between the club and Chicago Title and Trust Company, reciting a representation by the club that it had paid \$245,000 on account of the purchase price,

funds for the use and benefit of the plaintiffs, and that the
statute of limitations constituted a bar to plaintiffs' recovery.
On exceptions to the master's report the commission found that
defendant was not a trustee in the property of the
breach of trust; that plaintiffs were not entitled to any
accounting, either on the ground of trust or tort; and that
plaintiffs were not entitled to a declaration of breach of
the intention of the estate of defendant and of its heirs.
The accounting claimed is a condition precedent to recovery, and
plaintiffs' action is barred on account of the statute of
limitations.

It is noted that the master's findings are as follows:
in, we think a comprehensive statement of the issues involved
may be had from the master's findings of the master, as follows:
It appears that on July 15, 1927, an agreement was entered into
between the defendant, a corporation, and the plaintiff, a
Trust Company, Limited, as trustee, on the one hand, and the
upon which the master's findings were later based as a
price of \$1,000,000, subject to the 1927 bonus, of which the
seller agreed to pay one-third. The purchase price was \$500,000,
and the balance was to be paid in installments bearing interest
at 6 per cent from July 1, 1927, and when the aggregate sum of
\$500,000 had been paid the seller was to take a mortgage of
\$1,000,000.

Thereafter, on November 22, 1927, an agreement was
entered into between the defendant, a corporation, and the
plaintiff, and the Trust Company, Limited, (which is referred
to as "guarantor" throughout the master's report). It was
tained a copy of the contract between the club and Chicago
Title and Trust Company, reciting a representation by the club
that it had paid \$247,000 on account of the purchase price,

that it owned accounts receivable of \$300,000 and would acquire additional accounts receivable of about \$100,000 before January 1, 1928; that it would organize a corporation under the laws of Illinois, to which the premises would be conveyed subject to the provisions of the contract, and that the club would cause this corporation to execute first mortgage bonds of \$4,000,000, principal and interest to be payable at the office of the defendant, which was to act as the club's fiscal agent. The bonds were to be secured by a first mortgage upon the premises and improvements. \$500,000 of these bonds were to be subordinated to the balance of \$3,500,000. The mortgage was to contain a sinking fund provision for the retirement of not less than 40 per cent, as per schedule of sinking funds described therein, and in accordance with the schedule of sinking fund payments the subordinated bonds were to be paid prior to the balance of the indebtedness.

The contract provided that the building corporation was to demolish all structures and to construct thereon a 38-story steel building containing stores, offices and club rooms, at a cost of not less than \$2,750,000 and not more than \$3,000,000, and the contractors were to accept payment in junior securities of not less than \$500,000. It was further provided that the club would cause the building corporation to deliver to the defendant, Halsey, Stuart & Company, an appraisal of the property and improvements as a completed project.

The agreement further provided that the club would cause the building corporation to sell to the purchaser (Halsey, Stuart & Company) the entire issue of \$4,000,000 at 90 per cent plus accrued interest to the date of the delivery of the interest certificates. In the event the cost of the building should be less than \$2,750,000, then the bond

that it owned accounts receivable of \$1,000,000 and that it owned additional accounts receivable of about \$1,000,000. It was further provided that it would organize a corporation in the State of Illinois, to which the parties would contribute property and the provisions of the contract, and that it should be a part of this corporation to execute first mortgage bonds of \$1,000,000 principal and interest to be payable to the order of the defendant, which was to be as the trustee of the first mortgage bonds were to be secured by first mortgage bonds of the defendant and improvements, and that there should be a provision relating to the balance of the first mortgage bonds of the defendant and provision for the payment of interest on the first mortgage bonds, as per rate of interest to be determined by the parties and in accordance with the schedule of sinking fund payments the amortized bonds were to be paid prior to the maturity of the first mortgage bonds.

The contract provided that the building corporation was to demolish all structures and to construct thereon a 33-story steel building containing stores, offices and shops, as a part of the plan that \$1,500,000 was not more than \$3,000,000, and the contractors were to accept payment in junior securities of not less than \$1,000,000. It was further provided that the club would cause the building corporation to deliver to the defendant, Halsey, Stuart & Company, an appraisal of the property and improvements as a completed project.

The agreement further provided that the club would cause the building corporation to sell to the principal (Halsey, Stuart & Company) the entire issue of \$4,000,000 at 90 per cent plus accrued interest to the date of the delivery of the interest certificates. In the event the cost of the building should be less than \$2,750,000, then the bond

issue was to be reduced proportionately. The carrying charges up to January 1, 1928 were to be supplied by the building corporation, and the balance was to be financed with the first mortgage bonds.

One clause of the agreement provided that the club would, on demand of Halsey, Stuart & Company, cause a letter in the form known as "President's letter" to be addressed and delivered to it, giving a complete summary of the affairs of the club and the building corporation, and that it would, prior to the payment of the bonds by defendant, at its own expense, cause them to be qualified for sale in the State of Illinois and would furnish defendant all appraisals, records and other data which might be necessary in order to qualify the bonds for sale under the securities laws of other states. Appended to the agreement was a "proposed financial set-up" as follows:

Financing

| | |
|---|-------------|
| 1 First Mortgage 15-year 6% bonds..... | \$4,000,000 |
| 2 Junior bonds at 6-1/2% to be
taken by contractors..... | 500,000 |
| Net cash paid on land..... | 245,000 |
| Accounts receivable guaranteed by
Club, not less than..... | 420,000 |
| | <hr/> |
| Total..... | \$5,165,000 |

Cost of Property

| | |
|---|-------------|
| Estimated cost of building, including
Architect's fees, Surety and Com-
pletion Bonds..... | \$2,800,000 |
| Net cost of land..... | 1,500,000 |
| First Mortgage Commission..... | 400,000 |
| 18 mos. interest on \$4,000,000 at 6%..... | 360,000 |
| 6 mos. interest on \$500,000 Junior Mort-
gage Bonds at 6-1/2%..... | 16,125 |
| Taxes and insurance during construction,
estimated at..... | 30,000 |
| Loan expenses, including cost of Guarantee
policy, printing and certifying Bonds,
Trustee's Fee, appraisals, etc., esti-
mated at..... | 40,000 |
| | <hr/> |
| Total..... | \$5,146,125 |

issue was to be reduced proportionately. The carrying charges up to January 1, 1915 were to be supplied by the building corporation, and the balance was to be financed with the first mortgage bonds.

One clause of the agreement provided that the club would, on demand of the corporation, execute a letter in the form known as "trustee's certificate" to be delivered and delivered to it, giving a certificate as to the title of the club and the building corporation, and the receipt, prior to the payment of the bonds of the club, of its own expenses, cause them to be qualified for a loan in the name of the club and would furnish defendant all particulars, a copy and other data which might be necessary in order to enable the bonds for sale under the securities laws of other States. It was to be the duty of the club to be proposed financial statement as follows:

Financial Statement

| | |
|--------------------------------|-------------|
| 1 First Mortgage Bonds at 100% | \$4,000,000 |
| 2 Junior Bonds at 100% | 500,000 |
| 3 Cash on hand | 245,000 |
| 4 Accounts receivable | 482,000 |
| 5 Club, not less than | |

Total \$4,227,000

Cost of Property

| | |
|--|-------------|
| Estimated cost of building, including Architect's fees, interest and taxes | \$1,500,000 |
| Net cost of land | 1,500,000 |
| First Mortgage Commission | 400,000 |
| 18 mos. interest on \$4,000,000 | 300,000 |
| 6 mos. interest on \$500,000 Junior Bonds | 10,125 |
| Estimated cost of guarantee | 30,000 |
| Loan expenses, including cost of guarantee policy, printing and certifying Bonds | |
| Trustee's fee, appraisals, etc., cash | 40,000 |
| Total | \$2,140,125 |

On January 25, 1928 another agreement was entered into between the Steuben Club and Halsey, Stuart & Company extending the time for performance under the terms of the original agreement 70 days, and amending the security under the lease that the club was to execute to \$300,000 instead of \$500,000.

Thereafter, on April 12, 1928, an appraisal was made by Mark Levy & Brothers, who predicated its valuation upon the assumption that the building would be completed in accordance with the plans and specifications, including a lease by the club of a portion of the premises, and the assumption of good management and completion of the building within a reasonable time. It fixed the valuation of the land and buildings at \$6,700,698, estimated the gross annual income at \$874,364, the annual maintenance, including taxes and interest, at \$304,804.67, leaving an annual net return, before interest amortization and federal taxes, in the amount of \$569,559.33. This was capitalized at 8-1/2%, arriving at a total value of \$6,700,698 for the land, building and equipment. The value of the land was specified at \$2,199.885, and the value of the building, including architect's fees and cost of financing, at \$4,500.813.

On April 18, 1928 the trust indenture was executed as of March 1, 1928 between the 188 West Randolph Street Building, the Steuben Club and the Union Trust Company as trustee. The 188 West Randolph Street Building was organized for the purpose of signing the trust indenture and bond issue pursuant to the agreement of November 23, 1927. The trust indenture contains the guaranty of the club for the payment of bonds and interest and the covenants of the building corporation. The indenture stated that the building corporation was about to borrow \$4,100,000 to be secured by Series "A" and "B" to be issued

On January 22, 1923 another agreement was entered into between the Steuben Club and the Union Trust Company relating to the time for performance under the terms of the original agreement 70 days, and extending the maturity under the loan to the club was to extend to \$300,000 instead of \$250,000.

Thereafter, on April 12, 1923, an appraisal was made by John Levy & Brothers, who, in their appraisal, upon the assumption that the building would be completed in accordance with the plans and specifications, including a lease by the club of a portion of the building, at the expiration of 70 days management and completion of the building within a reasonable time, it fixed the value of the land on buildings at \$6,700,000, estimated the total value of the land at \$74,504,304,204.67, leaving an unpaid net return, before interest, amortization and Federal taxes, in the amount of \$20,000,000.33. This was capitalized at 6-1/2%, resulting in a total value of \$6,700,000 for the land, building and equipment. The value of the land was specified as \$1,900,000, and the value of the building, including electric lights and cost of financing, at \$4,800,000.

On April 12, 1923 the first indenture was executed as of March 1, 1923 between the 188 West Randolph Street Building, the Steuben Club and the Union Trust Company as trustees. The 188 West Randolph Street Building was organized for the purpose of signing the trust indenture and bond issue pursuant to the agreement of November 23, 1922. The trust indenture contains the guaranty of the club for the payment of bonds and interest and the covenants of the building corporation. The indenture stated that the building corporation was about to borrow \$4,100,000 to be secured by Series "A" and "B" to be issued

thereunder. Series "B" was subordinated to Series "A" and under a provision of the trust deed it was contemplated that Series "A" should be first paid and satisfied prior to the discharge of Series "B," but the schedule of payments to the sinking fund contained in the agreement between the club and defendant provided that Series "B" should first be liquidated from the sinking fund.

One of the articles of the trust indenture recited that the building corporation had, simultaneously with the delivery thereof, deposited with the "Paying Agent" one-third of the next accruing installments of interest payable on all bonds of both series. The first installment of interest was to fall due September 1, 1928. The trust deed also provided that commencing May 1, 1928 and on the first of each month thereafter, the building corporation was to deposit with the defendant as "Paying Agent" one-sixth of the next accruing installments of interest on all bonds then outstanding and unpaid, and that the "Paying Agent" should apply the deposited moneys in payment of interest on bonds as the same fell due. The building corporation was also to deposit with the "Paying Agent," commencing with September 1, 1930, monthly deposits for the semiannual retirement of the bonds in the future. The trust indenture stated that the building corporation guaranteed that it was well seized of the land and had good title to the mortgaged property in fee simple, clear of all claims and incumbrances as of the date of the delivery of the trust deed. It also obligated the mortgagor to demolish the structures on or before April 30, 1928 and to construct the building and complete it not later than June 1, 1929 at a cost of not less than \$2,750,000.

Halsey, Stuart & Company was designated in the trust indenture as "Paying Agent" and it was provided that it should

thereunder. Series "B" was subordinated to Series "A" and under a provision of the trust deed it was contemplated that Series "A" should be first paid and satisfied prior to the discharge of Series "B", but the schedule of payments to the sinking fund contained in the agreement between the club and the bank provided that Series "B" should first be paid, and from the sinking fund.

One of the articles of the trust indenture provided that the building corporation had, at its option, to deliver thereat, deposited with the "Paying Agent" on or before the next accruing installments of interest, a sum in full of both series. The first installment of interest was to fall due September 1, 1923. The trust deed also provided that commencing May 1, 1928 and on the first of each month thereafter, the building corporation was to deposit with the defendant as "Paying Agent" one-sixth of the next accruing installments of interest on all bonds then outstanding and unpaid, and that the "Paying Agent" should apply the deposited money in payment of interest on bonds as the same fell due. The building corporation was also to deposit with the "Paying Agent", commencing with September 1, 1930, monthly deposits for the semiannual retirement of the bonds in the future. The trust indenture stated that the building corporation guaranteed that it was well seized of the land and had good title to the mortgaged property in fee simple, clear of all claims and encumbrances as of the date of the delivery of the trust deed. It also obligated the mortgagee to demolish the structures on or before April 30, 1928 and to construct the building and complete it not later than June 1, 1929 at a cost of not less than \$2,750,000.

Halsey, Stuart & Company was designated in the trust indenture as "Paying Agent" and it was provided that it should

not be liable for any negligence, omission, mistake or misconduct of its agents or attorneys if it should take reasonable care in selecting them; and that it should not be liable for anything in connection with the trust except through its gross negligence or wilful misconduct.

On the same day that the trust indenture was executed (April 18, 1928) a Disbursing Agreement was entered into between the building corporation, the Steuben Club and the Union Trust Company, as well as certain architects and contractors, which referred to the execution of the bond issue, the trust indenture, the covenants therein, to the execution of the junior bond issue in the amount of \$550,000, and to the agreement with the defendant for the sale of the bonds. The defendant was not a party to that agreement but was referred to therein as "Underwriters," and the agreement was designated as an "underwriting contract." It recited that the defendant, as underwriters, had deposited the net purchase price of the bonds in the sum of \$2,490,113 with the Union Trust Company as disbursing agent, and that the building corporation and the club had directed the defendant in writing to pay said sum through the disbursing agent.

The building corporation agreed to construct upon the premises, not later than June 1, 1929, a building free and clear of all liens in accordance with certain specifications deposited with the Union Trust Company and covenanted to deposit with the disbursing agent certain sums of money commencing June 1, 1928, to April 1, 1929, a total of \$25,000. The Union Trust Company, as disbursing agent, could make disbursements from the bond interest reserve account, real estate taxes reserve account, trustee's and disbursing agent's fees and all other disbursements for carrying charges without any further order, authority or approval. All other disbursements were to be made pursuant to certificate issued by the architect or the representative

of the underwriters.

The underwriters designated Winston & Company as their representative in approving plans and specifications or modifications thereof and in supervising construction and completion of the building. The agreement referred to the defendant as the "underwriters" and provided that the disbursing agent should render monthly statements to the underwriters, all of which appears from the disbursement agreement.

The defendant issued two checks on April 18, 1928, one in the amount of \$1,192,503.51, payable to the Chicago Title and Trust Co. as trustee, being the balance of the purchase price of the land under the contract between the Club and the Chicago Title and Trust Company. The second check was dated the same date and was for the sum of \$2,490,113, and was payable to the Union Trust Company of Chicago. Both of the checks were made in accordance with the directions of the building corporation, and it was also directed to withhold \$40,000 for expenses, as provided in the disbursement agreement.

The defendant realized a profit at the expiration of this transaction in the sum of \$377,883.47.

The defendant then proceeded with the sale and marketing of the securities. As of June 8, 1928, Kuhlow purchased from the defendant a \$1,000 bond of the Steuben bond issue. He paid therefor \$1,116.67, being part in cash and part in another bond which was called for payment by the defendant. When plaintiff Kuhlow purchased his bond from the defendant he read and relied on the statements contained in the prospectus which was then issued, delivered and publicised by the defendant.

The master found that "This prospectus and the use of it in marketing the bond issue to the general public must be strongly condemned. It is in the form of a letter dated May 29, 1928, from the President of the Building Corporation,

of the underwriting.

The underwriting was done by the defendant, who was a representative in the following sense: the defendant was a member of the Chicago Title and Insurance Company, which was a corporation of the State of Illinois. The defendant was a member of the Chicago Title and Insurance Company, which was a corporation of the State of Illinois. The defendant was a member of the Chicago Title and Insurance Company, which was a corporation of the State of Illinois.

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addressed to Halsey, Stuart & Co., Inc. It contains a statement to the effect that the Building Corporation owned the property in fee. This statement is untrue and misleading in that said building corporation has paid only a small part of the purchase price of the land and the balance has in fact been paid by the defendant after the sale of the bonds. The entire tone of the prospectus and the language used therein is calculated to deceive and mislead the ordinary investor or layman who would purchase bonds. It contains a statement to the effect that the cost of the original furnishings to be placed in the rooms of the Steuben Club was approximately \$300,000. The truth of the matter is that no furniture or furnishings had been bought at the time the prospectus was publicised and the entire matter of the furniture rested upon a covenant by said ~~Steuben~~ Club contained in the agreement between the Club and Halsey, Stuart & Co., dated January 25, 1928. In truth and in fact the covenant for furnishing the Club quarters provided that the furnishings should be complete within six months after the construction of the building."

The master found that "The prospectus also contained the statement to the effect that funds from the proceeds of the sale of the bonds had been deposited as a trust fund with the disbursing agent, 'to be applied towards the cost of construction'. The prospectus did not state the actual fact that a portion of the proceeds of the bond issue was applied toward payment of general taxes for the year 1927, and a great portion thereof was applied to complete the payment of the purchase price of the land. In this regard the prospectus is definitely misleading although the statements therein contained may be literally true when given a strict construction.

"The prospectus also stated that the land and building had been valued by an independent appraiser at a total of

addressed to Wiley, Trust & Co., Inc. It contains a statement to the effect that the Building Corporation owned the property in fee. This statement is untrue and misleading in that said Building Corporation has paid only a small part of the purchase price of the land and the balance has in fact been paid by the defendant after a sale of the bonds. The entire issue of the prospectus and the 1932 report thereon is calculated to deceive and mislead the ordinary investor or lender and would produce bonds, if sold, to the detriment of the holders of the original securities to be issued in the issue of the Building Club was approximately \$1,000,000. The title of the matter is that no statement or information has been given as to the line the prospectus was published and the entire matter of the future raised in a movement. The Building Club, which in the agreement between the Building Club and Wiley, Trust & Co., dated January 25, 1932, in truth and in fact the agreement for raising the Building Club provided that the Building Club should be complete within 12 months after the completion of the building.

The matter found that the prospectus also contained the statement to the effect that funds from the proceeds of the sale of the bonds had been deposited as a trust fund with the disbursing agent, to be applied towards the cost of construction. The prospectus did not state the actual fact that a portion of the proceeds of the bond issue was applied toward payment of general taxes for the year 1932, and a small portion thereof was applied to complete the payment of the purchase price of the land. In this regard the prospectus is definitely misleading although the statements therein contained may be literally true when given a strict construction.

"The prospectus also stated that the land and building had been valued by an independent appraiser at a total of

\$6,700,695. This statement was literally true but actually misleading in that the prospectus did not state the conditions upon which the appraiser arrived at the stated value of the property, that is, by a capitalization of the net income and based upon the assumption that the building was properly completed pursuant to plans and specifications, and further, that the rental under the lease to the Steuben Club in the sum of \$250,000 per annum would be fully and promptly paid to the Club throughout the term of 25 years. The prospectus also purported to reflect the total gross earnings, operating expenses and net earnings. It did not disclose to the investor that these figures were of necessity only an estimate, and they were based upon payment in full of the rental due the Steuben Club under the said lease."

On June 5, 1928 Halsey, Stuart & Company sold \$100,000 of these bonds to the Foreman Trust & Savings Bank, from whom Litwin, one of the plaintiffs, later purchased \$7,000 of bonds. Litwin testified that when he purchased these bonds he was shown a document which resembled the prospectus, but since he could not read English, some person at the bank from whom he purchased the securities read portions of the prospectus to him.

The master further found that "No monthly deposits of principal or interest secured by the provisions of the trust indenture were made either by the Building Corporation or by the Steuben Club. However, interest was paid to the holders of the bonds up to September 1, 1930. The funds for the payment of such interest were deposited with the defendant out of the funds which it had theretofore deposited with the Union Trust Company as disbursing agent, representing the purchase price of the bonds. It also appears that over \$35,000 was paid on the 1927 taxes against the real estate herein by the disbursing agent, and some \$15,000 was used to pay insurance premiums.

\$6,700,000. This statement was filed in 1937 and actually misleading in that the newspapers did not state the conditions upon which the report was given. The stated value of the property, that is, the liquidation of the net income and based upon the assumption that the liquidation was properly completed pursuant to the provisions of the Act, and further, that the rental under the lease of the property was in the sum of \$250,000 per annum would be \$1,125,000 and properly paid to the City of New York. The proceeds also purported to be the net income, operating expenses and net income, and that these figures were only an estimate, and they were based upon payment in full of the rental due the City under the lease.

On June 5, 1937, the City of New York sold \$1,125,000 of these bonds to the Federal Reserve Bank, from whom it was, one of the plaintiffs, later purchased \$7,000,000 of bonds. It was testified that when he purchased these bonds he was shown a document which contained the prospectus, but since he could not read English, some person at the time from whom he purchased the securities read portions of the prospectus to him.

The master further found that the monthly deposits of principal or interest accrued by the provisions of the trust indenture were made either by the building corporation or by the attached City. However, interest was paid to the holders of the bonds up to September 1, 1937. The funds for the payment of such interest were deposited with the defendant out of the funds which it had theretofore deposited with the Union Trust Company as disbursing agent, representing the purchase price of the bonds. It also appears that over \$15,000 was paid on the 1937 taxes against the real estate herein by the disbursing agent, and some \$15,000 was used to pay insurance premiums.

None of these facts were ever disclosed to any of the purchasers of the bonds; in fact, as hereinabove set forth, the true situation with reference to the issuance of the bonds was grossly and fraudulently misrepresented to the buying public."

It appears from the master's findings that "On August 29, 1930, the defendant addressed a communication to the bondholders, in which it stated that it had just been informed that funds would probably not be available for the payment of interest due Sept. 1, 1930, and that it had been led to believe that the Building Corporation and the Club would meet this obligation. This statement, in view of the fact that the defendant had knowledge that no monthly deposits of interest had ever been made by the Building Corporation of the Club, constituted a fraudulent concealment and misrepresentation. ** Thereafter, on September 8, 1930, another communication was addressed to the bondholders by the defendant, to the effect that the bonds were then in default and it would be necessary to organize a Protective Committee, and the cooperation of the bondholders by depositing their bonds with the Committee was requested. It closed with the statement that the defendant still considered the bonds well secured and did not advise their sale at current market prices."

On September 3, 1930, the Bondholders' Protective Committee was formed for both series "A" and "B". Plaintiff Litwin deposited his bonds of Series "A" on September 13, 1930, representing \$7,000 of his bonds, evidenced by Certificate No. C-63. Plaintiff Kuhlew deposited his bond on September 22, 1930, evidenced by Certificate No. M-3067.

It appears from the master's report and the record that the premises have been involved in various types of litigation since March 25, 1930, when a suit to foreclose a mechanic's lien was filed. The trustee of the bond issue filed a cross-complaint seeking foreclosure of the bond issue, resulting in the appoint-

-11-

None of these facts were ever disclosed to any of the purchasers of the bonds; in fact, as hereinabove set forth, the true situation with reference to the issuance of the bonds was grossly and fraud-

lently misrepresented to the buying public.

It appears from the master's findings that on August 22, 1930, the defendant executed a communication to the bondholders, in which it stated that it had been informed that funds would probably not be available for the payment of interest due Sept. 1, 1930, and that it had been led to believe that the building corporation and the Ohio would meet this obligation. This statement,

in view of the fact that the defendant had knowledge that no monthly deposits of interest had ever been made by the building corporation of the Ohio, constituted a fraudulent concealment and misrepresentation. On September 8, 1930, another communication was addressed to the bondholders by the defendant, to the effect that the bonds were then in default and it would be necessary to organize a protective committee, and the cooperation of the bondholders by depositing their bonds with the Committee was requested. It closed with the statement that the defendant still considered the bonds well secured and

did not advise their sale at current market prices.

On September 8, 1930, the bondholders' protective committee was formed for both series "A" and "B". Plaintiff Litwin deposited his bonds of series "A" on September 15, 1930, representing \$7,000 of his bonds, evidenced by Certificate No. C-63. Plaintiff Kholow deposited his bond on September 22, 1930, evidenced by Certificate No. K-3067.

It appears from the master's report and the record that the premises have been involved in various types of litigation since March 25, 1930, when a suit to foreclose a mechanic's lien was filed. The trustee of the bond issue filed a cross-complaint seeking foreclosure of the bond issue, resulting in the appoint-

ment of a receiver who managed the property until appointment of a trustee in bankruptcy, and on August 5, 1935, an involuntary petition for corporate reorganization under section 77B was filed and approved on December 30, 1935.

The master found that "From September 9, 1930, to September 19, 1936, divers communications were addressed to the bondholders by the Protective Committee. In none of these letters were the facts above set forth ever disclosed with reference to a diversion of a portion of the proceeds of the sale of the bonds to the purchase of the land and to the payment of general taxes for the year 1927, or that funds deposited with Halsey, Stuart & Co. for interest requirements were not made by the mortgagor or the Club, but were made out of funds deposited with the Disbursing Agent."

With respect to the foregoing misrepresentations found by the master to have been made in the prospectus for the sale of bonds, the record shows that Litwin had no dealings whatsoever with defendant, but bought his \$7,000 of bonds from the Foreman Bank sometime in 1928 about 13 years before suit was instituted. Litwin could not find the circular which he said he had received from the bank at the time of the purchase. Moreover, he was unable to read English when he bought the bonds but testified that someone at the bank read him a circular which resembled a copy of the prospectus received in evidence. He was then asked by his counsel whether he "relied on the statements that were read to you from the circular," but the master sustained defendant's objection to the question. Subsequently, after Litwin had received two letters from the bondholders' committee, he deposited his bonds, for which a receipt was issued to him.

The other plaintiff, Kuhlow, purchased a \$1,000 bond, series A, from Halsey, Stuart & Company on June 11, 1928. He

ment of a receiver who managed the property until appointment of a trustee in bankruptcy, and on August 2, 1935, an involuntary petition for corporate reorganization under section 77A was filed and approved on December 3, 1935.

The master found that on September 1, 1935, to September 15, 1935, various communications were addressed to the bondholders by the respective trustees. In none of these letters were the facts above set forth, nor disclosed with reference to a diversion of a portion of the proceeds of the sale of the lands to the purchase of the land and to the payment of general taxes for the year 1935, or that the master had a full knowledge of the facts for interest payments and the sale of the bonds on the 15th, but were all made in full reports with the master's Agent.

With respect to the preceding misrepresentations found by the master to have been made in the prospectus for the sale of bonds, the record shows that the master had no dealings whatsoever with defendant, but bought his \$1,000 of bonds from the Foreman Bank sometime in 1935 about 17 years before said sale instituted. Master could not find the circular which he said he had received from the bank at the time of the purchase. Moreover, he was unable to read English when he bought the bonds but testified that someone at the bank read him a circular which resembled a copy of the prospectus received in evidence. He was then asked by his counsel whether he "relied on the statements that were read to you from the circular," but the master sustained defendant's objection to the question. Subsequently, after Litwin had received the letters from the bondholders' committee, he deposited his bonds, for which a receipt was issued to him.

The other plaintiff, Zuhlow, purchased a \$1,000 bond series A, from Halsey, Stuart & Company on June 11, 1938. He

testified that before he made the purchase he had been shown the circular or prospectus which described the bond issue. He took it home with him and read it over, relied upon the statements in the circular, none of the details of which he could remember at the time of the hearing, and had faith in Halsey, Stuart & Company, from whom the purchase was made and whom he regarded as a reliable concern. It was not until years later that he learned from his present counsel that some of the representations made in the prospectus were false.

Plaintiffs seek to excuse their delay of more than ten years before bringing suit by pleading ignorance of the fraud. So far as Litwin is concerned there is nothing of record to indicate when or where he first acquired knowledge of the alleged fraud, or that he was unaware of the facts upon which he now relies. Kuhlow contends that he was first apprised by his attorney that the representations were false, but he admits that he had made no effort at any time before that to find out whether they were false. Both parties stipulated that the premises had been in litigation since 1930, when a suit to foreclose a mechanics' lien on the property was filed in the Circuit court. For 11 years after the bond issue went into default there had been reorganization proceedings of the mortgagor, foreclosure proceedings of the trust deed securing the bonds owned by plaintiffs, the appointment of a receiver who managed the property until he was superseded by the trustee appointed by the United States District Court in 1933 under an involuntary petition in bankruptcy against the building corporation, and an involuntary petition for a corporate reorganization under section 77B; during all this time and through all this litigation plaintiffs did nothing. In 1930 they received a communication from Halsey, Stuart & Company, advising them that funds would probably not be available for the payment of interest due September 1, 1930, and another communi-

-12-

testified that before he made the purchase he had been shown the circular or prospectus which described the bond issue. He took it home with him and read it over, relied upon the statements in the circular, none of the details of which he could remember at the time of the hearing, and had faith in Halsey, Stuart & Company, from whom the purchase was made and who he regarded as a reliable concern. It was not until years later that he learned from his present counsel that some of the representations made in the prospectus were false.

Plaintiffs seek to prove their belief of more than ten years before bringing suit by relying on notices of the fraud. So far as Halsey is concerned there is nothing of record to indicate when or where he first learned the facts of the alleged fraud, or that he was unaware of the facts upon which he now relies. Halsey contends that he was first apprised by his attorney

that the representations he made were false, and he admits that he had made no effort at any time before suit was filed out whether they were false. Both parties stipulated that the promises had been made in litigation since 1930, and it is to be noted as a mechanical

lien on the property was filed in the Circuit Court, for 11 years after the suit issue went into default there had been no organization proceedings of the mortgage, for which proceeds of the trust deed securing the bonds owned by plaintiffs, the appointment of a receiver who managed the property until he was superseded by the trustee appointed by the United States

District Court in 1935, under an involuntary petition in bankruptcy against the building corporation, and an involuntary petition for a corporate reorganization under section 77B, during all this time and through all this litigation plaintiffs did nothing. In 1930 they received a communication from Halsey, Stuart & Company, advising them that funds would probably not be available for the

payment of interest due September 1, 1930, and another communi-

cation advising them that the bonds were then in default and that it would be necessary to organize a protective committee, and requesting their cooperation by depositing their bonds with the committee. They were also told that a consolidated balance sheet of the club would be gladly furnished upon request. It would seem to us that this was actually an invitation to ascertain the facts of which they now complain. Nevertheless they failed or refused to do so. Kuhlow had consulted a lawyer about his rights some six or eight years before these proceedings were filed, but still took no steps to assert them. Having stood by while foreclosure proceedings were being litigated and receivers and trustees were appointed for the benefit of their bonds, without pursuing the avenues of information that were available to them, plaintiffs are not in a position to interpose the defense of ignorance of fraud of which they now complain. The rule that delay will not bar relief where the injured party is ignorant of the fraud has no application to situations where a party might have ascertained the fraud by the use of means of information within his reach. Want of knowledge caused by the failure to exercise diligence, is no excuse. Simpson v. Manson, 345 Ill. 543, Neagle v. McMullen, 334 Ill. 168. We think the chancellor properly found that plaintiffs' action is barred by the Statute of Limitations (Ill. Rev. Stat. 1943, ch. 83). The very formation and functioning of the bondholders' committee, its letters written to plaintiffs from time to time, as well as the communications received by them from defendant, all after the bonds had gone into default, indicate that there was no concealment, that plaintiffs were not lulled into sleeping on their rights and believing that all was well when it was not; in fact, these various steps in the litigation should have actuated plaintiffs to investigate and protect their rights. McNeil v. Bulkley, 269 Ill. App. 1 (certiorari denied by the Supreme court). The transactions complained of took place in 1928. Suit was not

action advising them that the bonds were then in default and that it would be necessary to organize a protective committee, and requesting their cooperation by depositing their bonds with the committee. They were also told that a consolidated balance sheet of the club would be filed with the court. It would seem to us that this was a total lack of invitation to certain the facts of which they now complain. Nevertheless they failed or refused to do so. While the committee is not bound by its rights some six or eight years before the bonds were filed, but still took no steps to assert them. When asked by the committee closure proceedings were being initiated and the committee were appointed for the purpose of local bonds, without preserving the avenues of information that were available to them, the committee are not in a position to interfere with the exercise of the franchise of the club which they now complain. The club that they will not bar relief where the injured party is innocent of the fraud has no application to situations where a party might have obtained the fraud by the use of means of information within his reach. Want of knowledge caused by the failure to exercise diligence, is no excuse. Simpson v. Hanson, 249 Ill. 507, 100 Ill. App. 2d 111, 105 Ill. 2d 111. We think the chancellor properly found that plaintiffs' action as barred by the Statute of Limitations (Ill. Rev. Stat. 1943, ch. 83). The very formation and functioning of the bondholders' committee, its letters written to plaintiffs from time to time, as well as the communications received by them from defendant, all after the bonds had gone into default, indicate that there was no concealment, that plaintiffs were not lulled into sleeping on their rights and believing that all was well when it was not; in fact, these various steps in the litigation should have actuated plaintiffs to investigate and protect their rights. McNeil v. Enkley, 269 Ill. App. 1 (certiorari denied by the Supreme Court). The transactions complained of took place in 1938. Suit was not

brought until 1941. It is therefore obvious that any action at law was barred by the Statute of Limitations.

Plaintiffs were evidently aware of this fact, because in the reply brief filed by Litwin in the companion appeal (case No. 42432) he says that "Because of the intervention of the Statute of Limitations as to the suit against the persons who floated the fraudulent bond issue wherein they represented that the land was owned in fee when it was in fact not owned, plaintiff has lost his remedy against such persons"; and it was apparently in an effort to avoid the application of the statute that they filed this suit on the chancery side and alleged breaches of trust predicated upon the theory that "the underwriter stood in a fiduciary capacity as trustee toward the bondholders" and is therefore "liable for its breach of fiduciary duty and trust." The validity of this contention rests entirely upon the supposition that Halsey, Stuart & Company was a trustee of funds for the use and benefit of bondholders. If it was a trustee, guilty of the wrongful diversion of trust funds, then plaintiffs and other bondholders would be entitled to an accounting; if not, there could be no liability for a breach of trust. The master found and the court held that Halsey, Stuart & Company was actually the purchaser of the entire bond issue, and not a trustee, and that no fiduciary relationship existed between it and the bondholders. The agreement of November 23, 1927 between the Steuben Club and Halsey, Stuart referred to defendant as "purchaser" throughout. Indeed, the prospectus upon which both plaintiffs seek to rely, referred to defendant as the purchaser of the bonds. This was in accordance with the facts, because under the agreement between Halsey, Stuart and the Steuben Club, the former had agreed to purchase the \$4,000,000 of bonds at the price of 90 per cent. Under the agreement of purchase and sale, defendant was absolutely and unconditionally obligated to pay

the full purchase price for all the bonds to the maker thereof, regardless of whether it was able to sell any of the bonds or not. There was no condition or provision of any sort to indicate that defendant, after its purchase of the bonds, would sell or retain them, either wholly or in part. Neither was defendant in the position of collecting money from different persons to whom it sold the bonds and remitting such funds to the building corporation or to the latter's agent and trustee, Union Trust Company. Defendant bought all the bonds and paid the entire purchase price therefor before selling any of them. Neither did the fact that the bonds were secured by a trust deed to the Union Trust Company make the defendant a trustee because it happened to purchase or own all or some of the bonds, or because it happened to resell some of the bonds to others. Defendant did not become a trustee of the money which it received from the sale of the bonds as the proceeds belonged solely to the defendant; nor was it or the Foreman Bank under any obligation to hold any moneys received by them from the sale of the bonds for the use or benefit of any person other than themselves. The only funds that defendant received from the bondholders were those derived from the sale of the bonds and these funds belonged solely to the defendant.

The four essentials to the creation of a trust are set forth in The People ex rel. Nelson v. Chicago Bank of Commerce, 296 Ill. App. 497 (aff'd in 371 Ill. 396). The Supreme court there held that in order to create a trust the instrument must with reasonable certainty "disclose the property embraced, the beneficiaries in whose behalf it is created, the nature of the interest of such beneficiaries and the manner in which the trust is to be executed or performed." None of these essentials is found in the case at bar.

Under circumstances showing a transaction involving purchase and sale it was held in People ex rel. Nelson v. Central

Manufacturing District Bank, 306 Ill. App. 15, that no fiduciary relationship existed between the parties. The relationship between the bank and its customer in that case was much more intimate than that of the parties in the case at bar, the reliance by the customer on the bank's statements was greater, the duties of the bank in connection with the flotation of the mortgage loans were far more detailed; the bank even used its own money to pay interest and principal without disclosing that fact to its customers. Nevertheless, and in spite of the further claim that the bank was acting as the investment agent for its customer, the court held there was no fiduciary relationship and no fraud shown. In Leichner v. First Trust Co. of Lincoln, 133 Neb. 170, 274 N.W. 475, it was held that no fiduciary relationship existed between a trust company and one to whom it sold bonds, notwithstanding the fact that the company was trustee under the mortgage securing the bonds.

Among the contentions advanced by plaintiffs is that Halsey, Stuart misused the bondholders' money. So far as we are able to ascertain, the only money ever received by defendant from the bondholders represented the purchase price of the bonds and belonged to defendant, and when plaintiffs purchased their bonds they had only such rights as were given to them under the bonds, and the trust deed securing them. There is an apparent inconsistency between the claim that the bondholders were beneficiaries or cestuis of the money they paid for their bonds, and the established fact that they were the actual owners of the bonds.

These considerations lead us to the conclusion that Halsey, Stuart & Company was not a trustee, and while the master's findings as to certain statements, made by defendant in the prospectus, were fully warranted, nevertheless, the defendant was not guilty of the wrongful diversion of trust funds.

The cause of action sought to be asserted against defendant could have been brought at law as well as in equity, because courts

Manufacturing District Bank, 300 11th St., S. D., that no fiduciary relationship existed between the parties. The relationship between the bank and its customer in this case was much more intimate than that of the parties in one case or the other, and the fact that the bank's statements were correct, and that it was not in connection with the transaction of the bank's business that the bank even used its own money to pay interest and principal without disclosure, and that it was not in its statements, however, and in spite of the fact that the bank was not holding as the investment agent for its customer, and could hold there was no fiduciary relationship between them. In Indigene v. First Trust Co. of Chicago, 133 Ill. 411, 412, 413, it was held that no fiduciary relationship existed between a trust company and one to whom it sold bonds, and that the fact that the company was trustee under the mortgage securing the bonds, among the considerations advanced by the plaintiff in that case, should mislead a non-technical mind, so that we are not to be certain, the only money advanced by the bank to the bondholders represented the money so sold of the bonds and belonged to defendant, and when plaintiff purchased credit bonds they had only such rights as were given to them under the bonds, and the trust deed securing them. There is an apparent inconsistency between the claim that the bondholders are beneficiaries or grantees of the money they paid for their bonds, and the established fact that they were the actual owners of the bonds.

These considerations lead us to the conclusion that the bank, Stuart & Company was not a trustee, and while the bank's findings as to certain statements, made by defendant in the prospectus, were fully warranted, nevertheless, the defendant was not guilty of the wrongful diversion of trust funds.

The cause of action sought to be asserted against defendant could have been brought at law as well as in equity, because courts

of law will entertain actions for fraud and deceit such as are charged in this proceeding, but, as already indicated, plaintiffs evidently brought suit in equity to avoid being barred by the Statute of Limitations. The rule is well settled that where there is a concurrent remedy at law, equity not only follows the Statute of Limitations, but applies it as an absolute bar. (Sloan v. Graham, 85 Ill. 26; Bonney v. Stoughton, 122 Ill. 536; Harding v. Durand, 138 Ill. 515.) Therefore, we think the chancellor not only properly approved the master's recommendation that any cause of fraud was barred by the statute, but his finding that the equitable doctrine of laches applied and barred plaintiffs' recovery was properly made. The decree of the Superior court should be affirmed, and it is so ordered.

DECREE AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

43000

ALBERT J. HORAN, for use of
EDDY STOKER CORPORATION,

Appellee,

v.

CONTINENTAL CASUALTY COMPANY,
a corporation,

Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This was a suit prosecuted in the Circuit court by Albert J. Horan, bailiff of the Municipal court of Chicago, for the use of Eddy Stoker Corporation, to recover damages for a breach of the undertaking expressed in a forthcoming bond filed in a replevin suit in the Municipal court and executed by the defendant, Continental Casualty Company, as surety. Trial by jury resulted in a verdict and judgment for plaintiff in the sum of \$400 and costs, from which defendant has taken an appeal.

The salient facts disclose that on March 28, 1942 Eddy Stoker Corporation claimed to be the owner and entitled to possession of an automatic coal burner installed in the premises of Saul Plast, located at 5510 Cornell avenue, Chicago, known as the Cornell Hotel. Plast having refused to surrender the property, the Eddy Corporation sued out a writ of replevin from the Municipal court to acquire possession. Instead of surrendering the stoker in accordance with the command of the writ, Plast filed a forthcoming bond in the amount of \$500 with the bailiff of the Municipal court, signed by Continental Casualty Company as surety. The condition of the bond was that "If the said Saul Plast, Defendant, will appear in and defend the said action, and will deliver such property in accordance with the order of the Court in as good condition as it was when the said

32-I.A. 525

43000

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

ALBERT J. HORAN, for use of
EDDY STOKER CORPORATION,
Appellee,
v.
CONTINENTAL CASUALTY COMPANY,
a corporation,
Appellant.

MR. JUSTICE PRINE DELIVERED THE OPINION OF THE COURT.

This was a suit prosecuted in the Circuit Court by Albert J. Horan, bailiff of the Municipal Court of Chicago, for the use of Eddy Stoker Corporation, to recover damages for a breach of the undertaking expressed in a forthcoming bond filed in a replevin suit in the Municipal Court and executed by the defendant, Continental Casualty Company, as surety. Trial by jury resulted in a verdict and judgment for plaintiff in the sum of \$400 and costs, from which defendant has taken an appeal.

The salient facts disclose that on March 28, 1942 Eddy Stoker Corporation claimed to be the owner and entitled to possession of an automatic coal burner installed in the premises of Earl Plant, located at 5510 Cornell Avenue, Chicago, known as the Cornell Hotel. Plant having refused to surrender the property, the Eddy Corporation sued out a writ of replevin from the Municipal Court to acquire possession. Instead of surrendering the stoker in accordance with the command of the writ, Plant filed a forthcoming bond in the amount of \$500 with the bailiff of the Municipal Court, signed by Continental Casualty Company as surety. The condition of the bond was that "If the said Earl Plant, Defendant, will appear in and defend the said action, and will deliver such property in accordance with the order of the Court in as good condition as it was when the said

action was commenced and if the said Defendant will pay all costs and damages that may be adjudged against him in such action, then this obligation to be void; otherwise to remain in full force and effect." The replevin suit was tried in the Municipal court on May 14, 1942, Plast having appeared and interposed a defense. Trial by the court without a jury resulted in an order finding the right of property in the Eddy Corporation and directing the return of the coal burner to plaintiff. Plast having failed or refused to comply with the order, the Eddy Corporation thereafter brought suit on the forthcoming bond and recovered a judgment against the surety before Lloyd W. Lehman, a justice of the peace, for \$500 and costs. An appeal was prosecuted to the Circuit court by the surety company, where a trial by jury resulted in a verdict and judgment in favor of plaintiff in the amount of \$400. Upon the trial of the cause in the Circuit court plaintiff introduced in evidence a certified copy of the judgment in the Municipal court finding title in the Eddy Corporation. Defendant thereupon sought to reopen the issue of title by showing that the interest of the plaintiff in the property was simply a lien rather than ownership, but the Circuit court refused to permit defendant to do so.

The surety company rests its case solely on the proposition that "Where a plaintiff in a replevin sues on a bond he is limited in his recovery to the interest which plaintiff had in the property sought to be replevied," and in connection with that contention it is argued that defendant should have been permitted to show that the interest of plaintiff was only a claim against the property for \$100. This claim is founded upon the statement in defendant's brief that Plast purchased a stoker from the Eddy Corporation under a conditional sales contract, that he paid \$700 on account of

the purchase price, leaving a balance of \$100; that a disagreement occurred between the claimant and the purchaser as to the unpaid balance of \$100 because of faulty mechanism in the stoker; and that the replevin proceeding was thereupon instituted to acquire possession of the chattel. We find nowhere in the record any evidence of a contract of conditional sale, nor as to the amount paid on account of the purchase price.

Neither is there any evidence of a disagreement between plaintiff and purchaser as to the unpaid balance of \$100 because of faulty mechanism in the stoker. The sole authority for these statements is found in several rejected offers of proof by which defendant sought to relitigate the issue of title which had previously been adjudicated in the Municipal court. Judge

Normoyle of the Circuit court properly refused to permit it to do so. It is the well settled rule in this state that where the judgment in replevin has disposed of the question of title, the matter is res judicata in a suit on the bond, and defendant will not be permitted to relitigate the matters of the replevin action in such a proceeding. The rule is stated in 54 C. J. 654 as follows: "Where the judgment in replevin passes on the question of title or possession to the property, the matter is res judicata in an action on the replevin bond, and the rule is the same in an action on the redelivery bond." In Birma v. Muir, 152 Ill. App. 505, it was held that "By the judgment the merits of the case were determined and the defendants in the action on the bond could not assert that the plaintiff in replevin had title to said property." This doctrine was enunciated by the courts of this state as early as 1873. McMurchy v. O'Hair, 67 Ill. 242 (1873), was an action on a replevin bond, and the only question presented by the record related to the admissibility of certain evidence offered by the defendants for the purpose of proving

the purchase price, leaving a balance of \$100; that a disagreement occurred between the claimant and the purchaser as to the unpaid balance of \$100 because of faulty mechanism in the stoker; and that the replevin proceeding was thereupon instituted to acquire possession of the stoker. We find nowhere in the record any evidence of a contract of conditional sale, nor as to the amount paid on account of the purchase price. Neither is there any evidence of a disagreement between plaintiff and purchaser as to the unpaid balance of \$100 because of faulty mechanism in the stoker. The sole authority for these statements is found in several rejected offers of proof by which defendant sought to relitigate the issue of title which had previously been adjudicated in the Municipal court. Judge Normoyle of the Circuit court properly refused to permit it to do so. It is the well settled rule in this state that where the judgment in replevin has disposed of the question of title, the matter is res judicata in a suit on the bond, and defendant will not be permitted to relitigate the matters of the replevin action in such a proceeding. The rule is stated in 54 C. 2, 654 as follows: "Where the judgment in replevin passes on the question of title or possession to the property, the matter is res judicata in an action on the replevin bond, and the rule is the same in an action on the redelivery bond." In Birns v. Birns, 152 Ill. App. 705, it was held that "By the judgment the merits of the case were determined and the defendants in the action on the bond could not assert that the plaintiff in replevin had title to said property." This doctrine was enunciated by the courts of this state as early as 1873. McMunich v. O'Hart, 67 Ill. 242 (1873), was an action on a replevin bond, and the only question presented by the record related to the admissibility of certain evidence offered by the defendants for the purpose of proving

that the property replevied belonged in fact to the plaintiff in the replevin suit. The court disposed of that question by saying that "Apart from other objections to this evidence, it is sufficient to say, that the parties are concluded by the judgment in the replevin." In Schott v. Youree, 142 Ill. 233 (cited in 54 C. J. 652, sec. 426), the court held that a judgment is conclusive on the surety named in the forthcoming bond even though he was not a party defendant to the action of replevin.

Of course, if the merits of the case had not been determined in the replevin suit, the surety company could have interposed that as a defense and litigated title to the property in dispute. It is so provided in section 26 of the Replevin Act (ch. 119, Ill. Rev. Stat. 1943); but it is only in those cases where the merits of the replevin action have not been determined that the question of title can be litigated in the suit on the bond. An examination of the decisions upon which defendant relies discloses, almost without exception, that the plaintiff was not the owner of the property in question but was concededly a mere lienholder such as an execution creditor or a chattel mortgagee. In the early cases of King v. Ramsay, 13 Ill. 619, and Warner v. Matthews, 18 Ill. 83, cited by defendant, it was held that under the particular facts there presented defendants were entitled to assert in the litigation on the bonds that they were the general owners of the property replevied, subject to certain limitations, but only because the question of ownership had not been adjudicated in the replevin actions there under consideration. In the Matthews case that fact was specially pleaded pursuant to section 26 of the Replevin Act. In both decisions the court clearly indicated that if the question of title had been adjudicated in the replevin suit it would have been res judicata in the suits

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on the bonds that they were the general owners of the property
presented defendants were entitled to assert in the litigation
by defendant, it was held that under the particular facts there
Ramsay, 13 A.L.J., and Langer v. Mattawa, 18 A.L.J., cited
for or a chattel mortgage. In the early cases of King v.

on the bonds.

We think the doctrine of res judicata and the decisions supporting it are determinative of the principal question presented in this proceeding. The Eddy Corporation would have acquired possession of the stoker, to deal with as its own, if no forthcoming bond had been filed, and we think the mere filing of a bond should not, and was never intended to, affect the rights of the plaintiff; the bond simply stands in the place of the property (Red River Valley Trust Co. v. Poswell, 173 Okla. 96, 44 p. (2d) 956). Plaintiff is entitled either to the property or its fair and reasonable value; and since the jury assessed the value of the stoker upon competent evidence adduced upon the hearing at \$400, we would not be justified in disturbing the verdict and judgment, because the amount is not challenged by defendant.

For the reasons indicated we are of opinion that the judgment of the Circuit court should be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

43220

3241.A. 526

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

JOHN J. WILLIAMS,
Plaintiff in Error.

ERROR TO CRIMINAL
COURT, COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

John J. Williams, together with Frank J. Malone and George Gore, a captain and patrolman of the Chicago Police Department, respectively, were indicted in the Criminal court of Cook county for conspiring together and with persons whose names were unknown to the grand jury to operate gaming houses situated in the 16th police district of the city, owned and operated by Williams and others. They were tried by a jury and at the close of the people's case a motion to instruct the jury to find defendants Malone and Gore not guilty, was sustained by the court and the jury was so instructed. A similar motion made on behalf of Williams was overruled. The motion was renewed at the close of all the evidence and likewise overruled. The jury returned a verdict finding Williams guilty and assessed a fine against him of \$2,000, upon which judgment was entered. This writ of error was sued out to reverse that judgment.

The state adduced the testimony of some fourteen witnesses to prove the conspiracy charged. Williams and four other witnesses testified on his behalf. From a careful examination of the testimony it clearly appears that defendant was proven guilty of the crime as charged in the indictment by overwhelming evidence. Defendant admitted that he owned and operated numerous gambling establishments located in the general vicinity of 63rd street and Kedzie avenue, and at least three witnesses testified that they joined with him and agreed to operate gambling establishments as

PEOPLE OF THE STATE OF ILLINOIS,
 Defendant in Error,

v.

JOHN J. WILLIAMS,
 Plaintiff in Error.

MR. JUSTICE FRANK M. WELLS, CHIEF JUSTICE OF THE COURT.

John J. Williams, together with Frank J. Malone and

George Gore, a captain and proprietor of the Chicago Police

Department, respectively, were indicted in the Criminal

Court of Cook County for conspiracy, receiving and with

persons whose names were known to the grand jury to

operate gaming houses situated in the 13th police district

of the city, owned and operated by Williams and others.

They were tried by a jury and at the close of the people's

case a motion to instruct the jury to find defendants Malone

and Gore not guilty, was sustained by the court and the jury

was so instructed. A similar motion made on behalf of

Williams was overruled. The motion was renewed at the close

of all the evidence and likewise overruled. The jury returned

a verdict finding Williams guilty and assessed a fine

against him of \$2,500, upon which judgment was entered.

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other witnesses testified on his behalf. From a careful

examination of the testimony it clearly appears that defend-

ant was proven guilty of the crime as charged in the indict-

ment by overwhelming evidence. Defendant admitted that he

owned and operated numerous gambling establishments located

in the general vicinity of 63rd street and Kedzie Avenue,

and at least three witnesses testified that they joined

with him and agreed to operate gambling establishments as

charged in the indictment. Defendant argues that there was no evidence tending to show that he entered into any unlawful agreement with anybody to operate gambling houses, but under the well established rule in this state it is not necessary to prove an express agreement; the conspiracy may be shown by proof of facts from which the jury may fairly infer that a conspiracy existed. In Ochs et al. v. People, 124 Ill. 399, the court said that "In nearly all cases, therefore, the conspiracy is proved by circumstantial evidence, namely, by proof of facts from which the jury may fairly imply it." In addition to defendant's admission that he was engaged in operating gambling houses, Howard Muir and George Duewerth testified that they expressly agreed with defendant to operate a gambling house as charged in the indictment, and from the testimony of Thomas Maher, Donald Happell, Thomas Murphy, Robert Doubek and other witnesses, the jury was justified in concluding that a conspiracy as charged in the indictment was entered into.

Aside from the contention that the verdict was contrary to the evidence, it is urged that the court erred in receiving incompetent prejudicial evidence offered by the state over defendant's objection. Specifically it is argued that the state's attorney requested the court to call Walter Knapp as the court's witness, because on a previous trial and in view of inconsistent statements theretofore made by him, the state was unable to vouch for his credibility and veracity. It appears that Knapp had testified before the same judge in another trial, and he was there called as the court's witness upon a showing that the prosecutor could not vouch for him. When he was called to the stand in the instant case the prosecutor called the court's attention to the fact that he had previously been called as the court's witness and again stated

charged in the indictment. Defendant argues that there was no evidence tending to show that he entered into any unlawful agreement with anybody to operate gambling houses, and that the well established rule in this case is that it is not necessary to prove an express agreement; the only thing that is necessary is proof of facts from which the jury fairly and properly can infer a conspiracy existed. In this case, the evidence, namely, the conspiracy as proved by the facts, is sufficient to establish by proof of facts from which the jury fairly and properly can infer in addition to defendant's testimony, that he was engaged in operating gambling houses. Defendant testified that he was engaged to operate a gambling house on the 1st of January, 1933, and from the testimony of other witnesses, namely, the testimony of Robert French and other witnesses, the jury was justified in concluding that a conspiracy existed in the indictment was entered into.

Defendant also argues that the evidence was contrary to the evidence, it is argued that the court erred in receiving inconsistent prejudicial evidence offered by the state over defendant's objection. The difficulty is in arguing that the state's attorney requested the court to call witness Knapp as the court's witness, because on a previous trial and in view of inconsistent statements the state made by him, the state was unable to vouch for his credibility and veracity. It appears that Knapp had testified before the same judge in another trial, and he was there called as the state's witness upon a showing that the prosecutor could not vouch for him. When he was called to the stand in the instant case the prosecutor called the court's attention to the fact that he had previously been called as the court's witness and again stated

that he could not vouch for him. The trial court, having had the opportunity to observe the demeanor of the witness in the first trial, was certainly in a position to determine whether Knapp should be called as the court's witness. In People v. Dascola, 322 Ill. 473, it was contended by the defendant that the court erred in calling Minnie Dascola as a court witness and allowing her to be impeached as to irrelevant matters on cross-examination. The court held where the state's attorney doubts the veracity of a witness and has no confidence in him for some good reason, the trial court may call such witness and leave him open for cross-examination by either side, but held that the right to do so ought to be exercised with great care and the practice adopted only where it is shown that otherwise there may be a miscarriage of justice (citing People v. Cardinelli, 297 Ill. 116; People v. Bernstein, 250 Ill. 63). In the instant case a proper foundation was laid for the request, and the court's experience with the witness in a previous trial justified him in acceding to the prosecutor's request.

Another contention urged by defendant is that the trial court erred in not permitting defendant to introduce evidence to determine whether the witness Henry Boerema, an investigator for the state's attorney, was an employee of the county of Cook. It was the contention of the defense that his remuneration was secretly arranged by one Scholler of the state's attorney's office and that his activities were purely political. Defendant's counsel offered to prove by the testimony of two employees of Cook county that Boerema was not a county employee. The point is scantily argued by both sides, and we are at a loss to understand the materiality of such evidence. No cases are cited in support of the contention that this constituted prejudicial error.

that he could not vouch for him, the trial court, having had the opportunity to observe the demeanor of the witness in the first trial, was certainly in a position to determine whether Knapp should be called as the court's witness. In People v. Pascale, 322 Ill. 47, it was contended by the defendant that the court erred in calling Pascale as a court witness and allowing him to be interrogated as to irrelevant matters on cross-examination. The court held that where the state's attorney denotes the veracity of a witness and has no confidence in him for some good reason, the trial court may call such witness and leave him open for cross-examination by either side, but held that the right to do so ought to be exercised with great care and the practice adopted only where it is shown that otherwise there may be a miscarriage of justice (citing People v. McDonald, 279 Ill. 116; People v. Bernstein, 270 Ill. 63). In the instant case a proper foundation was laid for the request, and the court's experience with the witness in a previous trial justified him in acceding to the prosecutor's request.

Another contention urged by defendant is that the trial court erred in not permitting defendant to introduce evidence to determine whether the witness Henry Boersma, an investigator for the state's attorney, was an employee of the county of Cook. It was the contention of the defense that his remuneration was secretly arranged by one Scholler of the state's attorney's office and that his activities were purely political. Defendant's counsel offered to prove by the testimony of two employees of Cook county that Boersma was not a county employee. The point is essentially argued by both sides and we are at a loss to understand the materiality of such evidence. No cases are cited in support of the contention that this constituted prejudicial error.

Lastly, it is urged that the misconduct of the state's attorney deprived defendant of a fair and impartial trial. During the cross-examination of Donald Happell, defendant's counsel propounded the following question: "You never heard of any of those other books down town or any other place being indicted, did you?" Mr. Austin of the state's attorney's office objected, and the court sustained the objection. Mr.

Napoli, another assistant state's attorney, addressing the court, said: "Judge could we have a ruling to have Mr. Burke cut out the play acting there by those questions, it is purely for one effect--" Defendant's counsel took exception to the statement, whereupon the state's attorney replied: "He knows very well that questions like that are not material to the issues in this particular case. *** If he wants in evidence the record of all the arrests of a lot of books, he knows the State has no right to produce it in evidence in this case." Defendant's counsel then stated that he "would like to have in evidence anybody else they indicted at 63rd and Kedzie," to which the state's attorney replied: "He knows very well the State has no right to introduce that in this case, other books, the arrest of other books, and yet he persists in asking the question." There can be no doubt that the questions of defendant's counsel were improper, and that the evidence which he sought to adduce was incompetent; and the state's attorney's statement as to the incompetency and impropriety of such evidence did not constitute misconduct on his part.

We think the case was fairly and impartially tried, free from any prejudicial error, and defendant was found guilty beyond a reasonable doubt, as charged in the indictment, by abundant and competent evidence. The judgment of the trial court should therefore be affirmed and it is so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

William, P. J., and Scamman, J., consent.

43168

324 I.A. 526²

JAYBILL CLOTHES, INC.,
Appellant,

v.

JOSEPH HARRIS et al.,
Appellees.

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) APPEAL FROM SUPERIOR
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) COURT OF COOK COUNTY.
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MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff filed what it calls "a true creditor's bill, not a bill to set aside any conveyances." After defendants had filed answers to the complaint the cause was referred to a master in chancery, who, after a hearing, filed a report, in which he made certain findings of fact and recommended that the complaint be dismissed for want of equity. The chancellor, Judge Lupe, overruled plaintiff's exceptions to the master's report and entered a decree dismissing plaintiff's complaint for want of equity. Plaintiff appeals.

The verified complaint alleges that plaintiff, on November 4, 1938, recovered a judgment for \$1,650.45 against the main defendant, Joseph Harris; that an execution issued upon the judgment was returned by the sheriff wholly unsatisfied and with a certificate that he could find no property in Cook county whereon to levy; that no part of this judgment has been paid and that it is in full force and effect; that plaintiff believes that Joseph Harris has sufficient property to pay said judgment but that it is and has been kept concealed; that plaintiff believes that Nora Harris and Marion Harris, relatives of Joseph Harris, are some of the persons in whose hands there is some of this property, real or personal, which is concealed and which should be applied to the payment of the judgment, and that upon a discovery by defendants under oath said property will be found adequate to

JAVIERA CROWNS, INC.,
Plaintiff,

v.

JOSEPH HARRIS et al.,
Defendants.

MEMORANDUM FOR THE COURT OF THE COUNTY OF COOK, ILLINOIS.

Plaintiff filed its complaint in this Court.

The complaint alleges that the defendant, after

defendants had filed answers to the complaint the case

was referred to a master in chancery, who, after a hearing,

filed a report, in which he made certain findings of fact

and recommended that the complaint be dismissed for want

of equity. The defendant, by its answer, controverted plaintiff's

exceptions to the master's report and asked a decree dis-

missing plaintiff's complaint for want of equity. Plaintiff

appeals.

The verified complaint alleges that plaintiff, on

November 4, 1930, recovered a judgment for \$1,000.00 against

the main defendant, Joseph Harris; that in execution issued

upon the judgment was returned by the sheriff wholly unsatis-

fied and with a certificate that he could find no property

in Cook County wherein to levy; that no part of this judg-

ment has been paid and that it is in full force and effect;

that plaintiff believes that Joseph Harris has sufficient

property to pay said judgment but that it is and has been

kept concealed; that plaintiff believes that Joseph Harris and

Nelson Harris, relatives of Joseph Harris, are some of the

persons in whose hands there is some of this property, real

or personal, which is concealed and which should be applied

to the payment of the judgment, and that upon a discovery by

defendants under oath said property will be found adequate to

pay the judgment, and plaintiff prays that defendants answer the complaint, under oath, and that the principal defendant, Joseph Harris, be decreed to pay the judgment and costs and to apply for that purpose any property so discovered; that a receiver be appointed with the usual powers; that the principal defendant may be enjoined from transferring or otherwise disposing of his property or effects, and for such further relief as may be necessary.

Counsel for plaintiff, in its brief, states that when the complaint was filed plaintiff had no information as to whether Joseph Harris had any property that could be reached. Plaintiff called as adverse witnesses the defendants, Joseph Harris, Nora Harris and Marion (Harris) Nieder. Nora Harris is the wife of Joseph Harris and Marion Nieder is their daughter. Plaintiff also called nine other witnesses and introduced thirteen exhibits. Defendants offered no testimony.

The master found that Joseph Harris was at one time the owner of the property at 3539 West Chicago avenue, Chicago, Illinois, but that he transferred the real estate to his wife many years before the judgment was entered and that there is no evidence to show that at the time of the transfer of the real estate to Nora Harris Joseph Harris was insolvent; that there is not sufficient evidence to show that Nora Harris is holding the real estate in trust for Joseph Harris, and that he therefore finds that the property is that of Nora Harris. The master further found that Joseph Harris borrowed \$4,000 from the Main State Bank on October 31, 1941, and deposited with that bank \$15,000 worth of life insurance policies as collateral; that nothing has been paid on account of the principal of the note; that there is not sufficient evidence to show that plaintiff has any right or claim against the said

pay the judgment, and plaintiff prays that defendant answer the complaint, under oath, and let the judgment be entered, and that plaintiff be decreed to pay the judgment and costs and to apply for that purpose any property as it may be necessary to recover be appointed with full power; that the defendant defendant may be enjoined from transferring or otherwise disposing of his property or effects, in any such further relief as may be necessary.

Counsel for plaintiff, in his brief, states that the complaint was filed in this court on October 1, 1941, and that whether Joseph Harris had any property that could be reached, Plaintiff called as witnesses at the trial, Joseph Harris, Mrs. Harris and Joseph Harris, Jr. Plaintiff is the wife of Joseph Harris and their father is their daughter. Plaintiff also called two other witnesses and introduced thirteen exhibits. Plaintiff offered no testimony. The master found that the property was at one time the owner of the property of Joseph Harris, Jr., who died in 1930, Illinois, but that he transferred the real estate to his wife many years before the property was entered and that there is no evidence to show that at the time of the transfer of the real estate to Mrs. Harris, Joseph Harris was insolvent; that there is not sufficient evidence to show that Mrs. Harris is holding the real estate in trust for Joseph Harris, and that he therefore finds that the property is that of Mrs. Harris. The master further found that Joseph Harris borrowed \$4,000 from the Main State Bank on October 21, 1941, and deposited with that bank \$1,000 worth of life insurance policies as collateral; that nothing has been paid on account of the principal of the note; that there is not sufficient evidence to show that plaintiff has any right or claim against the said

insurance policies. The master further found that defendant Joseph Harris does not have any property with which to pay the judgment rendered against him, and, therefore, recommends the dismissal of the complaint.

Plaintiff contends that the testimony uncovered property of Joseph Harris and therefore the master and the chancellor erred in holding that plaintiff did not make out a case and in dismissing the complaint for want of equity. Before the master plaintiff contended that a certain insurance policy taken out by the main defendant was his property "and that there was an overplus in the same," but in this court plaintiff, in its brief, abandons any claim as to this policy. The principal property that plaintiff contends belongs to Joseph Harris and that should be subjected to its judgment consists of a parcel of real estate located at 3539 West Chicago avenue, Chicago, Illinois. The uncontradicted evidence shows that this real estate was conveyed by Joseph Harris, through a nominee, to his wife, Nora Harris, on September 22, 1930. The judgment of plaintiff against Joseph Harris was based upon an indebtedness that was created in 1937 and the judgment was entered November 4, 1938, and there is no evidence that Joseph Harris, at the time of the conveyance, was insolvent; indeed, there is no evidence that at that time he had any creditors. Plaintiff states that it does not seek by its complaint to set aside the conveyance to the wife, but it seeks a finding and decree that the real estate has always been the property of defendant Joseph Harris and that he placed it in his wife's name as "a mere cover up and sham," that therefore the real estate "held by a wife in a secret trust belonging to the main defendant is subject to a creditor's bill." As to the burden that plaintiff would have to assume even if it had been a creditor at

the time of the conveyance, see State Bank of Clinton v. Barnett, 250 Ill. 312, 318, 319, wherein it is held that the owner of property may at any time give the same to anyone he chooses, so long as he thereby injures no existing creditor, and the mere fact that he may be indebted at the time of the conveyance is not alone sufficient to make a gift or conveyance by him inoperative, and that if a creditor fails to aver and prove the insolvency of the debtor at the time the conveyance was made he is entitled to no relief. (See, also, Knowles v. Crow, 289 Ill. App. 108, 112, 113.) The evidence shows that Joseph Harris paid \$33,000 for the real estate and there is a mortgage on it of \$26,000, held by the Massachusetts Mutual Life Insurance Company; that the mortgage is now larger than it was when the property was purchased, due to the fact that the Insurance Company has paid "a bunch of taxes accumulated;" that the Insurance Company has an assignment of the rents and most of the rents have been turned over to it for ten years; that the brother of Joseph Harris, Sam Harris, lives in the neighborhood of the real estate and collects the rents; that the total rents collected every month are \$287, out of which Nora Harris turns over to the Insurance Company \$220 and the balance is used for the purpose of paying the expenses of keeping up the property; "that the property brings in less than what the expenses are;" that the rents collected are deposited in the account of Nora Harris in the Mid City Bank. On August 7, 1941, the Massachusetts Mutual Life Insurance Company sent the following letter to Joseph Harris:

"Our Home Office has again given consideration to the problem in connection with our loan of the above number [7555 Harris], and we are advised that the loan will be permitted to stand in abeyance to July 1, 1942 at an interest rate of 4-1/2%

the time of the conveyance, see State of Oklahoma v. Barnett, 250 Ill. 511, 512, 513, wherein it is held that the owner of property may at any time, and the same to anyone he chooses, so long as he is a duly qualified owner, and the same fact that he may be indebted at the time of the conveyance is not alone sufficient to make a deed of conveyance by him ineffective, and that it is not sufficient to ever and prove the invalidity of the deed at the time of the conveyance was made he is entitled to be relieved, State v. Rogers, 259 Ill. 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

for that period, subject to monthly payments of at least \$220. to be applied on current interest, taxes, insurance premiums, and delinquent interest, and subject to all other terms of the note and mortgage.

"Mr. Lewis has informed you of our desire to have shown on the monthly statements being furnished us, all of the rental income from the property including the rental received from the second floor corner offices, which rental has heretofore been paid direct to your brother as an offset against personal services in connection with maintenance of the building. Please show this item on all statements hereafter, together with maintenance expenses incurred by your brother, properly identifying said maintenance items. Any surplus over and above maintenance costs incurred by your brother should be remitted to us for application to reduction of the principal of the loan, as it is very important that the principal be reduced as rapidly as possible."

Plaintiff states in its brief, "We rely largely on this letter to support our case." Undoubtedly, the evidence tends to show that Joseph Harris managed the property for his wife, a housewife, who has never been engaged in business. She testified that the property was losing money all the time "so there is nothing there," and that she had lost interest in it but that her husband, who acted as her agent, still took an interest in the property. The master found that "there is not sufficient evidence to show that Nora Harris is holding said real estate in trust for Joseph Harris." We have considered the letter in connection with all the other facts and circumstances bearing upon the question before us and we have reached the conclusion that the findings of the master in reference to the real estate were justified.

Plaintiff states that the evidence shows that Joseph

Harris owned a Plymouth automobile for which he paid \$848, that there was a chattel mortgage of \$700 on the automobile, and that his son-in-law owns the chattel mortgage and the chattel mortgage note, and it contends that the decree should be reversed because the trial court did not order the automobile turned over to the sheriff for sale. This contention is an afterthought, as the record fails to show that plaintiff made any motion either before the master or the chancellor that an order be entered that the automobile be turned over to the sheriff for sale. It is reasonably clear that during the hearing in the trial court the equity of Joseph Harris in the Plymouth automobile was not regarded as of any value.

The contention of plaintiff that the contents of a certain safety deposit box taken out in the names of Joseph Harris and Nora Harris were all subject to the judgment and that the court erred in not ordering the contents of the box turned over to the sheriff for sale is without the slightest merit. The evidence shows that Harris and his wife had a box at a bank; that Nora Harris paid the rent of the box every year and that all that was in the box was a couple of rings that belonged to her.

The evidence shows that Joseph Harris has a place at 312 South Halsted street where he keeps samples of clothing that he sells for Epstein Brothers, Philadelphia. Plaintiff contends that Joseph Harris' evidence tends to show that he still had, at that place, 119 suits that were a part of the merchandise that he had on hand at the time of the trial of the case wherein the judgment was entered, and that the trial court erred in not ordering the suits turned over to the sheriff for sale. We may assume, from the fragmentary testimony of Harris in reference to the suits, that it tends to support plaintiff's contention. Neither before the master

Harris owned a Plymouth automobile for which he paid \$248, that there was a chattel mortgage of \$700 on the automobile, and that his son-in-law owns the chattel mortgage and the chattel mortgage note, and it contends that the notes should be reversed because the trial court did not order the automobile turned over to the sheriff for sale. This contention is an afterthought, as the record fails to show that plaintiff made any motion either before the master or the chancellor that an order be entered that the automobile be turned over to the sheriff for sale. It is reasonably clear that during the hearing in the trial court the city of Joseph Harris in the Plymouth automobile was not turned over to any value. The contention of plaintiff that the contents of a certain safety deposit box which was in the name of Joseph Harris and Nora Harris were all turned over to the sheriff and that the court erred in not ordering the contents of the box turned over to the sheriff for sale is without the slightest merit. The evidence shows that Harris and his wife had a box at a bank; that Harris had the key of the box every year and that all things in the box were a matter of things that belonged to him.

The evidence shows that Joseph Harris had a place at 312 South Market Street where he kept a number of clothing that he sells for Spats and Brothers, Philadelphia. Plaintiff contends that Joseph Harris' evidence tends to show that he still had, at that place, 17 suits that were a part of the merchandise that he had on hand at the time of the trial of the case wherein the judgment was entered, and that the trial court erred in not ordering the suits turned over to the sheriff for sale. We may assume, from the fragmentary testimony of Harris in reference to the suits, that it tends to support plaintiff's contention. Neither before the master

nor the chancellor did plaintiff ask that the suits be turned over to the sheriff for sale. It is clear that plaintiff, in the trial court, relied upon its claim as to the real estate and the life insurance policy to support its contention that a decree should be entered in its favor. Joseph Harris practically volunteered the testimony as to the 119 suits and he testified that he was keeping them in good shape. Just why plaintiff has not levied upon these suits, under its judgment, is not shown by the record.

We think that the chancellor was fully justified under the evidence in entering the decree, and the decree of the Superior court of Cook county is therefore affirmed.

DECREE AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

43196

J. J. SCHWARTZ,
Appellee,

v.

ARTHUR C. CIMAGLIA,
Appellant.

APPEAL FROM CIRCUIT

COURT OF COOK COUNTY.

32-1-A-527

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A complaint praying for the dissolution of a partnership agreement between the parties, for the appointment of a receiver, for the payment of the creditors of the partnership, and for an accounting between the parties. Defendant appeals from a decree entered in the proceedings.

The cause was referred to a master in chancery, who heard evidence and filed a report in which he recommended that a decree be entered dissolving the partnership "and that such further proceedings be taken under the direction of this Court, as shall be required to effect an accounting between the plaintiff and the defendant with reference to any and all assets of said partnership and to determine the rights of all interested parties therein." Defendant filed but two objections to the master's report, viz: "First: For that the Master in his report in paragraph 5 thereof has made a finding that the filing of a bill of complaint herein by the plaintiff constituted an exercise of his right to dissolve the partnership. Second: For that the complaint herein in paragraph 1 thereof makes 'Exhibit 1', the partnership agreement a part of said complaint and it is provided in said agreement in paragraph 6 thereof that any moneys advanced by the plaintiff shall be refunded to him from the profits; that said complaint in paragraph 5 alleges that at no time has there been any profits of said partnership and the evidence

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before the Master is to this same effect. The complaint requests the return of advancements. The answer filed by defendant herein states that because of the said provisions of said partnership agreement and because of the absence of profits, the plaintiff is not entitled to the refund of any moneys so advanced by him and on this issue the Master fails to make any finding. Wherefore the defendant objects to the said report and submits that the same ought to be altered and varied." The master, in overruling the two objections, held: "(1) The objection marked 'First' is not well taken and is hereby overruled. (2) The objection marked 'Second' relates to a matter of accounting which my report recommends should follow the entry of a decree approving dissolution of the partnership in question. Consequently, said objection raises a premature question and is hereby overruled." The chancellor entered a decree overruling the exceptions of defendant to the master's report and confirmed the report. The decree finds that the allegations in the complaint "are substantially true as therein stated; that the equities of this cause are with the plaintiff and that the partnership heretofore existing between the plaintiff and the defendant should be terminated and dissolved," and decrees "that the partnership heretofore existing between the plaintiff and the defendant be and the same is hereby terminated and dissolved." The decree then makes provisions for the protection of the creditors of the partnership. The decree further provides: "That said John Mulder, Master in Chancery * * *, take an account of the partnership dealings between the plaintiff and defendant; and for the better discovery of the matters aforesaid the parties hereto respectively are ordered to produce before the said Master and to leave with him until otherwise directed all books, papers and writings in their

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custody or under their control relating thereto; and are to be examined upon oath and interrogatories as the said Master shall direct; and the said Master will cause to come before him all such witnesses whose testimony he may deem necessary, and examine them upon oath and interrogatories touching upon the said accounts. And it is ordered that what shall appear to be due from either party to the other on the balance of said account or to the creditors of the said partnership be paid to such person as shall be found to be entitled to the same from the assets of the said partnership within twenty days after the report of the said Master shall have been approved and confirmed by this court. And it is further ordered that the said Master make his report herein with all convenient speed, and that the said Master, or either of said parties, be at liberty to apply to the court for further directions; that all questions of costs of this proceeding, including stenographic expenses and Master's fees be reserved by this court for consideration."

At the outset of the hearing before the master counsel for defendant, in response to a question as to his position, stated: "Mr. Smith: Well, it seems to me, that I think perhaps either party would have the right to dissolve. There is no question about that in my mind at all. The only question is as to whether or not they have the right to come in and have the court dissolve them. That is the only question in my mind. They have not in any way set up facts showing there has been a dissolution here. They have set up facts which might give them a right to a dissolution, and if that is true, we deny these facts. I do not know whether it was necessary for them to put the facts in their complaint, but I did not draw the complaint. They put the facts in there and I denied

exactly on under their control relation thereto; and are to
be examined upon oath and interrogatories as the said court
shall direct; and the said parties will come to court before
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the said schedule. And it is ordered that the said parties
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same from the office of the said court within twenty
days after the report of the said court shall have been
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ordered that the said account shall be sent forthwith with all
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them, and that makes an issue. I will admit that if they said the partnership was dissolved and they asked the court to complete the accounting, there would be no question about it in my mind about their right to go ahead. But they set up certain facts and we deny those facts." It appears, therefore, that the position of defendant was that only the parties could dissolve the partnership; that the complaint failed to set up facts showing that the parties or either of them had dissolved the partnership, and that the sole jurisdiction of the trial court in a proceeding of this kind is to render an accounting between the parties after one or both of them had dissolved the partnership.

The master found, paragraph (4): "That during the period beginning April 17th, 1943, and ending February 9th, 1944, various differences and disputes arose between the said partners which impaired and hindered the successful operation of the partnership business * * *." Defendant made no objection to this finding. That the master was justified in ruling that the second objection filed by defendant related to the matter of accounting and was therefore a premature objection, is not disputed. The sole objection, therefore, that can now be urged relates to the finding of the master that the filing of the complaint constituted an effective and proper exercise of plaintiff's right to terminate and dissolve the partnership. That objection accords with the position taken by defendant's counsel at the outset of the hearing.

In this court, defendant abandons the position he assumed before the master and the chancellor and now contends that "the filing of a complaint to dissolve a partnership is not a sufficient fact upon which the court may base a decree dissolving a partnership in the same cause," and argues that

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the evidence adduced before the master would not warrant a dissolution of the partnership. It is hardly necessary to state that he cannot abandon the theory of his defense in the trial court and adopt another in this court.

The purpose of the partnership was to manufacture, sell and distribute specialties, games, toys and novelties. The partnership agreement provided for no definite term nor particular undertaking, nor was there any provision in reference to notice. Section 31 of the Uniform Partnership Act (ch. 100-1/2, par. 31, Ill. Rev. Stat. 1943) states: "Dissolution is caused: * ~ (b) By the express will of any partner when no definite term or particular undertaking is specified." In Thanos v. Thanos, 313 Ill. 499, the court said (p. 506): "Appellee testifies that he did not voluntarily withdraw from the partnership business of operating restaurants; that a controversy arose between the partners concerning the real estate transaction in question, and that appellant ordered appellee from the premises and told him that his services were no longer needed or desired; that this controversy occurred some time in the month of July, 1919, and that thereafter he engaged in the bakery business and in the real estate business. Whichever view is taken of the case, the partnership was dissolved some time between June 1 and August 1, 1919. We are not able from this record to definitely establish the date. Section 29 of the Uniform Partnership act provides that 'the dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.' Section 31 provides that this dissolution is caused by the express will of one of the partners when no definite term or particular undertaking is specified. Such was the situation

the evidence adduced before the master would not warrant a dissolution of the partnership. It is hardly necessary to state that he cannot abandon the theory of his defense in the trial court and adopt another in this court.

The purpose of the partnership was to manufacture, sell and distribute specialties, games, toys and novelties. The partnership agreement provided for no definite term nor particular undertaking, nor was there any provision in reference to notice. Section 31 of the Uniform Partnership Act (Ch. 100-1\2, par. 31, Ill. Rev. Stat., 1943) states: "Dissolution is caused: * * * (b) By the express will of any partner when no definite term or particular undertaking is specified." In Tanaka v. Tanaka, 313 Ill. App. 499, the court said (p. 506): "Appellee testifies that he did not voluntarily withdraw from the partnership business of operating restaurants; that a controversy arose between the partners concerning the real estate transaction in question, and that appellant ordered appellee from the premises and told him that his services were no longer needed or desired; that this controversy occurred some time in the month of July, 1919, and that thereafter he engaged in the bakery business and in the real estate business. Whichever view is taken of the case, the partnership was dissolved some time between June 1 and August 1, 1919. We are not able from this record to definitely establish the date. Section 29 of the Uniform Partnership Act provides that 'the dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.' Section 31 provides that this dissolution is caused by the express will of one of the partners when no definite term or particular undertaking is specified. Such was the situation

in this case. There was no definite term fixed for the life of the partnership and no particular undertaking was specified which required the continuance of the partnership to complete the undertaking. Either the act of appellant in declaring the partnership terminated or the act of appellee in withdrawing from the partnership business was in fact and in law a dissolution of the same." (Italics ours.) Section 32 of the said Act provides: "(1) On application by or for a partner the court shall decree a dissolution whenever: * * * (d) A partner wilfully or persistently commits a breach of the partnership or agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him. (e) The business of the partnership can only be carried on at a loss. (f) Other circumstances render a dissolution equitable." These provisions conclusively dispose of the position taken by defendant's counsel before the master. We are in accord with the finding of the master that the filing of the complaint "constituted an effective and proper exercise of his [plaintiff's] right to terminate and dissolve the partnership," and our conclusion in that regard disposes of the only objection made by defendant to the master's report that can be urged upon this appeal. However, as to the present position of defendant, that the evidence did not warrant a dissolution of the partnership, we may say that the evidence before the master showed constant charges, countercharges and serious disputes between the parties that made the successful operation of the business impossible. It is conceded that the business was being conducted at a loss. The master would have been fully warranted in finding that on February 7, 1943, defendant

in this case, there was no definite term fixed for the life of the partnership and no particular undertaking was specified which required the continuance of the partnership to complete the undertaking. Either the act of appellant in declaring the partnership terminated or the act of appellee in withdrawing from the partnership business was in fact and in law a dissolution of the same." (Italics ours.) Section 32 of the said Act provides: "(1) On application by or for a partner the court shall decree a dissolution whenever: * * * (b) A partner willfully or persistently commits a breach of the partnership or agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him. (c) The business of the partnership can only be carried on at a loss. (f) Other circumstances render a dissolution equitable." These provisions conclusively dispose of the position taken by defendant's counsel before the master. We are in accord with the finding of the master that the filing of the complaint "constituted an effective and proper exercise of his [plaintiff's] right to terminate and dissolve the partnership," and our conclusion in that regard disposes of the only objection made by defendant to the master's report that can be urged upon this appeal. However, as to the present position of defendant, that the evidence did not warrant a dissolution of the partnership, we may say that the evidence before the master showed constant charges, countercharges and serious disputes between the parties that made the successful operation of the business impossible. It is conceded that the business was being conducted at a loss. The master would have been fully warranted in finding that on February 7, 1943, defendant

locked all of the doors of the factory, refused to allow plaintiff admittance to the place, and that he told plaintiff to go and see his lawyer, that he did not want to talk to plaintiff. We are satisfied from the evidence that there was no chance of conducting the business amicably and successfully, and that it was for the best interest of both parties that the partnership be dissolved. It must be noted that the instant decree reserves all questions of accounting between the parties, and also protects the rights of creditors.

Defendant contends that "plaintiff and receiver should not employ the same attorney over objection of defendant," and implies that the receiver employed plaintiff's attorney. The order appointing the receiver makes no provision as to the employment of an attorney by the receiver and no appeal was taken by defendant from that order. The point now made was not raised before the master nor the chancellor and neither was called upon to pass upon such a point. We find no pleading in the record wherein defendant in an affirmative way asked the chancellor to direct the receiver not to employ plaintiff's attorney as his attorney. If defendant thought that the point was germane to the proceeding before the master and the chancellor he should have raised it in some apt way. The attorney for plaintiff volunteers a statement that at the time of the appointment of the receiver he stated to the chancellor that as the assets of the partnership would not be sufficient to pay the creditors in full he would act for the receiver without compensation. This statement has not been denied by defendant. The present point hardly deserves notice as it has really nothing to do with the merits of this appeal.

The decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

looked all of the doors of the factory, refused to allow plaintiff's admittance to the place, and that he told plaintiff to go and see his lawyer, that he did not want to talk to plaintiff. We are satisfied from the evidence that there was no chance of conducting the business amicably and successfully, and that it was for the best interest of both parties that the partnership be dissolved. It must be noted that the husband's degree reserves all questions of accounting with the parties, and also provides the rights of creditors.

Defendant contends that plaintiff and receiver should not employ the same attorney over objection of defendant, and implies that the receiver employed plaintiff's attorney. The order appointing the receiver makes no provision as to the employment of an attorney by the receiver and no such rule was taken by defendant from this order. The point now made was not raised before the master nor the chancellor and neither was called upon to pass upon such a point. We find no pleading in the record wherein defendant in any affirmative way asked the chancellor to direct the receiver not to employ plaintiff's attorney as his attorney. It is defendant's contention that the point was germane to the proceeding before the master and the chancellor he should have raised it in some apt way. The attorney for plaintiff volunteered a statement that at the time of the appointment of the receiver he stated to the chancellor that as the assets of the partnership would not be sufficient to pay the creditors in full he would act for the receiver without compensation. This statement has not been denied by defendant. The present point hardly deserves notice as it has really nothing to do with the merits of this appeal.

The decree of the Circuit Court of Cook County is affirmed.

Sullivan, P. J., and Friend, J., concur.

43197

DUANE WAKARAKER,
Appellant,

v.

WILLIAM B. McILVAINE, JR.,
Executor of the Last Will
and Testament of William
B. McIlvaine, Sr., Deceased,
Appellee.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

82-111,527

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a petition in this court for leave to appeal from an order of the Superior court of Cook county granting a new trial to William B. McIlvaine, Jr., Executor of the Last Will and Testament of William B. McIlvaine, Sr., Deceased, defendant. We allowed the appeal.

There was a trial of the cause before the court and a jury and a verdict was returned finding defendant guilty and assessing plaintiff's damages at the sum of \$5,750. Defendant filed a motion for a new trial in which many grounds were urged. The trial court entered an order setting aside the verdict of the jury and allowing a new trial "on the specific and only ground that the court erred in refusing to give to the jury, at the instance of the defendant, the following instruction: 'If you believe from the evidence in this case that there was no light in the stairway and that it was dark therein, and if you further believe from the evidence that the plaintiff, intending to take a stairway, could not see where the stairway was or the width of the landing; and if you further believe that he nevertheless stepped through the door onto the landing and then, without being able to see where the stairway was, stepped over to his right and fell down the stairway; and if you further believe from the evidence that such action

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on his part was negligence that proximately contributed in any degree to the happening of his injury, you must find the defendant not guilty.'" The instant appeal presents the single question as to whether or not the trial court committed reversible error in refusing that instruction.

Briefly stated, the complaint charged that on August 27, 1941, defendant's testate controlled, operated and managed an eight story office and store building in Chicago, at 180 North Wabash avenue; that Burgess Battery Company rented space on the fifth floor of the building; that George R. Bell was the manager of the company and plaintiff was its advertising counselor; that Bell was familiar with the corridors and toilet space on the fourth floor, and with the stairway leading from that floor to the third floor, but that plaintiff was unfamiliar with said toilet, corridor and stairways; that "it was then dark in said corridor, said stairway landing on said 4th floor, and said stairway leading towards the 3rd floor and towards the 5th floor. There was then, and there no other warning or guard to advise plaintiff of the said close proximity of said north edge of said landing to the north edge of said doorway;" that plaintiff at all times kept in close proximity to Bell, allowing the latter to take the lead, and was in the exercise of all due care and caution for his own safety; that plaintiff and Bell walked through the doorway on the fourth floor of the building to the stairway landing; that plaintiff then and there stepped over the north edge of said stairway landing and fell into said stairway well leading from the landing on the fourth floor thereof, while in the exercise of all due care and caution for his own safety; that defendant's testate was then guilty of one or more of the following wrongful acts: "(a) Carelessly and negligently operating, managing and maintaining said build-

ing by his agent. (b) Carelessly and negligently by said agent, failing to light or otherwise guard the said landing of said stairway on the 4th floor of said building and the stairway and stairway well leading from said landing towards the 3rd floor of said building. (c) Carelessly and negligently by said agent, maintaining a dangerous stairway landing on the 4th floor of said building and a stairway leading therefrom towards the 3rd floor thereof without providing safety facilities that would render said stairway and landing reasonably safe when used by the plaintiff. 10. As a direct and proximate result of one or more of the above wrongful acts by the said defendant by his agent, then, Duane Wanamaker, the plaintiff, while attempting ~~so~~ to walk from the 4th floor of said building to the 5th floor of said building by way of said landing and stairway, and while in the exercise of all due care and caution for his own safety, fell from said landing on the fourth floor thereof into the well of said stairway landing from the said 4th floor to the 3rd floor thereof so that as a proximate result thereof he suffered injuries to his person and body and damage to his clothing. 11. Plaintiff as a direct and proximate result of one or more of the said wrongful acts of the said defendant by his agent suffered the following injuries and damages:" The complaint then alleges the injuries that plaintiff sustained in the accident. The answer denied, inter alia, the allegation in the complaint that plaintiff was in the exercise of all due care and caution for his own safety at the time and place in question.

Plaintiff contends that the action of the trial court in refusing to give the instruction was justified because the instruction selected a few alleged facts for the jury to pass upon, ignored certain other facts in evidence, and that the instruction was in the form of a plea or argument to the jury;

furthermore, that the point of the refused instruction was covered in other instructions given to the jury. Defendant contends that the refused instruction is what is known as a theory of fact instruction and that it was the only such instruction tendered by defendant; that it is the established law of this State that either party has the right to have the jury instructed as to his theory of the case where there is evidence to support the theory; that a party is entitled to an instruction which applies directly and specifically to his theory of the facts, when there is evidence tending to support these facts; that the fact that several instructions bearing upon the doctrine of contributory negligence, but abstract in character, were given at the instance of defendant, does not cure the error in refusing to give the theory of fact instruction. Many decisions might be cited that bear upon the question now before us, but the law is so well established that we will cite only a few. In Thomas v. Chicago Embossing Co., 307 Ill. 134, the court states (p. 141): "There can be no question that a party to a cause of action is entitled to instructions which apply directly and specifically to his theory of the facts when there is evidence tending to prove these facts. (Chicago Union Traction Co. v. Leach, 215 Ill. 184; Fessenden v. Doane, 188 id. 228.) There was evidence tending to sustain plaintiff in error's theory that defendant in error's foot could not have gotten into the slot and become pinched. This being so, there was ample justification for the giving of such an instruction presenting to the jury directly the theory upon which plaintiff in error was trying the case. In our judgment it was reversible error to refuse to give this instruction or some other instruction properly presenting plaintiff in error's theory of its defense on this point." In Chicago Union Traction Co. v. Leach, cited in the Thomas case,

the court held that a party is entitled to an instruction which applies directly and specifically to his theory of the facts which there is evidence tending to prove, even though general instructions were given stating approved rules of law applicable to any case where negligence is charged but which were not directly and specifically applied to the facts of the case. Other cases holding that the giving of instructions, abstract in character, does not justify the refusal to give a proper theory of fact instruction might be cited. The instruction in question was the only theory of fact instruction tendered by defendant.

As we have reached the conclusion that the action of the trial judge in granting a new trial because of his refusal to give the instruction was justified, we will refrain from expressing any opinion as to the credibility of the witnesses or the weight that should be attached to their testimony, and we will avoid any expression as to the merits of the case. We are satisfied that the instruction is in proper form; that it is not an argumentative instruction, as plaintiff contends, and that the sole question is, was there any evidence tending to support the instruction. We find the following facts:

Defendant's testate operated the eight story building at 180 North Wabash avenue. Burgess Battery Company, a tenant of the building, had a store on the first floor and an office on the fifth floor. The building has passenger elevators and an enclosed fire escape stairway, sometimes called stair well, which had no windows, and the artificial lights therein were controlled by one switch. The building was not fully tenanted at the time; the fourth floor was entirely vacant and the sixth floor was partly vacant. About 6:45 p. m. on the evening of the accident all of the tenants had left the building and the lights in the stair well were then turned off. George R. Bell was the

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manager of the Burgess Battery Company and plaintiff was its advertising counselor. That evening Bell, the plaintiff and a third person dined together at the Boston Oyster House. They finished dinner shortly before seven o'clock. Bell and plaintiff walked back to the building, arriving there about 7:20. There was a washroom on the fourth floor and sixth floor, but none on the fifth floor. They took the elevator to the fourth floor, as Bell desired to use the facilities of the washroom. After they had used the washroom, instead of taking the elevator from the fourth floor to the fifth floor, where the office was, they went to the door leading to the stair well, intending to walk up the stairway to the fifth floor. Bell is the only witness who testified as to the accident. He testified that as they reached the door plaintiff was a little behind Bell and "on my right a little bit;" that he, Bell, turned the knob of the door leading into the stair well and pushed the door open "about forty-five degrees." "It was very dark" in there. "Q. [by plaintiff's attorney] Well, how dark would you say it was? A. Well, the kind of a dark you would say if you put your hand up in front of your face you couldn't see it. * * * It was pitch black;" that there was no artificial light in the stair well; that he, Bell, took one step over the threshold and stopped, but he kept his hand on the doorway or door knob; that as he crossed the threshold plaintiff was just behind him, "I could feel his presence just right with me as I went into the doorway, like anybody would do who was walking along next to you, behind you a little bit. He was more or less following me very closely;" that the stairway is about six or nine inches to the right of the door; that he, Bell, had taken just one step over the threshold and "the next thing I knew, I just heard him say 'Oh,' and he had disappeared. * * * I heard a

manager of the Bungalow Battery Company and Plaintiff was the
advertising counselor. That evening Plaintiff and
a third person dined together at the Bungalow Battery Company.
They finished dinner and they before seven o'clock, Plaintiff
and Plaintiff walked back to the Bungalow Battery Company, leaving there
about 7:20. There was a washing room on the fourth floor and
sixth floor, but none on the fifth floor. They went to
elevator to the fourth floor, as well as to the
facilities of the washing room. Plaintiff and Plaintiff
instead of taking the elevator from the fourth floor to the
fifth floor, where the office was, they went to the washing
room to the fifth floor, in order to wash up and get ready to
the fifth floor. Plaintiff is the one who was called as
to the accident. He testified that he had reached the door
Plaintiff was a little behind him and he was a little
bit; that he, Plaintiff, turned the knob of the door leading into
the stair well and pushed the door open about eight-fifty
degrees. "It was very dark in there," Plaintiff testified.
attorney) Plaintiff, how dark would you say it was? Well,
the kind of a dark you would say if you put your hand up in
front of your face you could not see it. It was pitch
black; that there was no artificial light in the stair well;
that he, Plaintiff, took one step over the threshold and stopped,
but he kept his hand on the doorway or door knob; that as he
crossed the threshold Plaintiff was just behind him, he could
feel his presence just right with me as I went into the door-
way, like anybody would do who was walking along next to you,
behind you a little bit. He was more or less following me
very closely; that the stairway is about six or seven inches
to the right of the door; that he, Plaintiff, had taken that one
step over the threshold and "the next thing I knew, I just
heard him say 'Oh,' and he had disappeared. I heard a

thud down below me a little bit. I was familiar with the stairway. So I knew about where -- that he had fallen somewhere and about where he had landed." The witness then testified that he went down the stairway, got plaintiff to his feet and "took him to the elevator, and rang for the elevator.

* * * Q. * * * What elevator did you get? A. The same elevator that we had come up on. Q. What floor? A. The fourth floor." The witness also testified that there was no light shining from the fourth floor into the stair well.

Plaintiff, in order to recover, was obliged to prove that he was not guilty of any negligence that proximately contributed to the happening of the injury, and the instruction applies solely to the element of contributory negligence and embodies defendant's theory of fact as to the conduct of plaintiff at the time and place in question. It was not necessary for defendant to embody in the instruction an antagonistic theory of fact. (See City of Chicago v. Schmidt, 107 Ill. 186; Dunn v. Crichfield, 214 Ill. 292; Spengler v. Eiger, 255 Ill. App. 322, 332.)

After giving careful consideration to the sole question before us we have reached the conclusion that there was evidence to sustain the instruction and that the trial court committed reversible error in refusing to give the instruction to the jury, and, therefore, his action in granting a new trial to defendant was fully warranted.

The order of the Superior court of Cook county granting defendant a new trial is affirmed.

ORDER GRANTING NEW TRIAL
AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

...and about where he had landed. In addition, the witness testified that he went down the stairs, got downstairs, to his foot and "took him to the elevator, and ran for the elevator. * * * a short elevator for him, and a long elevator that he had come up on. The witness also testified that there was no light shining from the elevator door into the street. Plaintiff, however, was obliged to move that he was not guilty of any negligence. It is respectfully submitted to the jury that the evidence in this case is entirely sufficient to establish the liability of the defendant at the time and place in question. It is not necessary for reference to any of the instructions in the instruction book of the Court, or to any of the cases cited in the brief, or to any of the authorities cited in the brief, or to any of the authorities cited in the brief. After giving careful consideration to the whole case before us we have reached the conclusion that there was evidence to sustain the instruction and that the trial court committed reversible error in failing to give the instruction to the jury, and, therefore, the action in granting a new trial to defendant was fully warranted.

The order of the Superior Court of Cook County granting defendant a new trial is affirmed.

ORDER ON WRITING NEW TRIAL
AFFIRMED.

Sullivan, J., and Friend, J., concur.

STATION, AIRCRAFT
STATION, AIRCRAFT

v.

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sidewalk and said curb so as to learn of the presence of the said condition and repair the same;" that at the time in question and for a long time prior thereto, at a point in front of 1541 or 1543 North Maplewood avenue, there was a certain defective condition in the said sidewalk in that "at a point where the said east sidewalk adjoins the alley just south of North Avenue, the said sidewalk was so constructed by the defendant herein through its agents, servants and employees so that it was at a higher and different level than the curb of the said alley thereto adjacent and the defendant * * * had direct knowledge and constructive knowledge of the said defective and dangerous condition;" that as a direct and proximate result of one or more of the said wrongful acts of defendant "plaintiff was caused to trip, stumble and fall," and she sustained serious and permanent injuries to her person, to the damage, etc. Defendant's answer denies, inter alia, that plaintiff was in the exercise of care and caution for her own safety; denies the sidewalk and curb were carelessly, negligently and improperly constructed and maintained; denies that there was any reason for repairs, or that any defective condition existed, or that the construction of the sidewalk created a defective or dangerous condition; denies that any act of defendant caused plaintiff to trip, stumble and fall.

The evidence shows that in 1937 the City constructed a new sidewalk on the east side of Maplewood avenue in the North 1500 block and that it used the old concrete sidewalk as a base for the new sidewalk. The accident happened at a point where the sidewalk reaches an alley running east and west. The street to the north of the alley is North avenue, which is the shopping street of that district. It runs east and west. LeMoyne street is the first street south of the alley; it runs east and west.

sidewalk and said curb so as to leave the gutter of the
said condition and repair the same; that at the time in
question and for a long time prior thereto, as a result of
front of 1541 or 1543 North Maplewood Avenue, there was a
certain defective condition in the said sidewalk in and about
a point where the said curb sidewalk joins the street just
south of North Avenue, the said sidewalk was so constructed
by the defendant herein through its agents, servants and em-
ployees so that it was at a slight and different level than
the curb of the said alley through which it runs; the defendant
* * * had direct knowledge and constructive knowledge of the
said defective and dangerous condition; that it is a direct and
proximate result of the or more of the said wrongful acts of
defendant "plaintiff was caused to slip, stumble and fall,"
and she sustained serious and permanent injuries to her person,
to the damage, etc. defendant's agent, servant, etc. (1541 or 1543)
that plaintiff was in the exercise of due and prudent care for
her own safety; denies the fact that the sidewalk was so con-
structed negligently and recklessly as to constitute a public nuisance; denies
that there was any reason for repairing or that any defective
condition existed, or that the construction of the sidewalk
created a defective or dangerous condition; denies that any
act of defendant caused plaintiff to slip, stumble and fall.
The evidence shows that in 1917 the city constructed
a new sidewalk on the east side of Maplewood Avenue in the North
1500 block and that it used the old concrete sidewalk as a base
for the new sidewalk. The accident happened at a point where
the sidewalk reaches an alley running east and west. The street
to the north of the alley is North Avenue, which is the shopping
street of that district. It runs east and west. Holmes Street
is the first street south of the alley; it runs east and west.

When the new sidewalk reached a point that was within a foot of the old curb on the south side of the alley, the City, in order to avoid a high step from the new sidewalk to the surface of the alley, utilized eight inches of the old sidewalk and the old curb, that was three inches wide, to construct a step with an eleven inch tread. This tread was five or six inches higher than the surface of the alley, and the surface of the new sidewalk was about five inches higher than the surface of the tread.

Plaintiff's position in the trial court was that the City in constructing the new sidewalk - instead of extending its surface to the curb at the alley - created, by reason of the step, a dangerous and unsafe sidewalk, and thereby caused the accident to plaintiff; that in any event the question as to whether or not the construction of the new sidewalk at the place in question created a dangerous or unsafe condition should have been submitted to the jury.

Counsel for defendant contend that in passing upon the question as to whether the design followed by the City constituted negligence we should be governed by the majority opinion in Healy v. City of Chicago, 131 Ill. App. 183, where it is said (p. 191): "The complaint is not that the work in building the walk was improperly or negligently done, but that its design was improper and injudicious. * * * This is a matter over which the courts have no control. They cannot compel the city to build any walk at all; because it has the power to grade and improve streets, it is not under obligation to do so. And having a discretion as to whether it will improve at all, it has also a discretion as to the kind of improvement, if any, it will make. * * * Its judgment as to what is the best kind of improvement is not subject to review by any court or jury in cases where the court cannot say,

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When the new sidewalk reached a point that was within a foot of the old curb on the south side of the alley, the City, in order to avoid a high step from the new sidewalk to the surface of the alley, aligned eight inches of the old sidewalk and the old curb, that was three inches wide, to construct a step with an eleven inch tread. This tread was five or six inches higher than the surface of the alley, and the surface of the new sidewalk was four five inches higher than the surface of the tread.

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Counsel for defendant contend that in passing upon the question as to whether the design followed by the City constituted negligence we should be governed by the majority opinion in Bealy v. City of Chicago, 111 Ill. 2d 183, where it is said (p. 181): "The court said it was not the work in building the walk was improper or negligently done, but that its design was improper and injurious." This is a matter over which the courts have no control. They cannot compel the city to build any walk at all; because it has the power to grade and improve streets, it is not under obligation to do so. And having a discretion as to whether it will improve at all, it has also a discretion as to the kind of improvement, if any, it will make. * * * Its judgment as to what is the best kind of improvement is not subject to review by any court or jury in cases where the court cannot say,

as a matter of law, that the plan itself is so dangerous that its construction was negligence.'" While in our view of this appeal it is unnecessary for us to pass upon this contention, we may say, however, that if it were necessary to pass upon it we would not sustain it. In our judgment the dissenting opinion of Mr. Justice Adams in the Healy case correctly states the law of this State. That distinguished jurist held that it was the law of this State that a municipal corporation must plan and construct its sidewalks so that they would be reasonably safe for the purposes for which they were intended. The majority opinion in the Healy case was written by Mr. Justice Brown, who later wrote the opinion in City of Chicago v. Reid, 141 Ill. App. 514, wherein he admits that many of the cases cited in the Healy case in support of the ruling of the majority of the court were later severely criticised by the Supreme court in City of Chicago v. Seben, 165 Ill. 371.

Defendant contends that plaintiff's testimony fails to show that the step in the sidewalk caused her to fall; that her testimony does not even show what caused her to fall. This contention is clearly a meritorious one. Plaintiff had lived at the northeast corner of North Maplewood avenue and LeMoyné street for about five years. Her home is half a block from the alley in question, and when she had occasion to go to North avenue, the "shopping district for our neighborhood," she used the sidewalk on the east side of North Maplewood avenue and passed the alley in question. The following is her entire testimony as to what occurred at the time and place of the accident: "Q. [by her attorney] Now, Mrs. Simpson, on July 30, 1942, did anything unusual happen to you? A. Well, I had an accident. Q. About what time of the day or night was the accident? A. About ten-thirty at night. Q. What was the condition of the weather outside at that time? A.

as a matter of fact, that the fact is that the
its consideration was not made. It is not
agreed it is immaterial for us to know of it
we say any, however, that it is not immaterial
it we could not know it. In our judgment, the
opinion of the court seems to be that the fact
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was the law of this State. The fact is that
that the court has not made a decision on the
only basis for the fact is that the court
majority opinion in the case of *Smith v. Smith*
shows, who has made the decision in *Smith v. Smith*
111 II. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

It was clear. Q. How about the sidewalks, were they wet or dry? A. No, they were dry. Q. Now, your accident happened where? A. At the alley at Maplewood. Q. And that alley is only just south of North Ave. - tell us - on which side of Maplewood? A. How's that? Q. (Repeating last question) A. What side of the alley? Q. No - - The Court: East or west side of Maplewood? The Witness: A. It was on the east side. Mr. Posner [attorney for plaintiff]: Q. Is that the same side you live on? A. Yes. Q. Where were you going at that time? A. I was going to the drugstore. Q. Where is that drug store located? A. It is right on the corner of Maplewood and North Ave. Mr. Posner: (Addressing some jurors) Do you ladies hear all right. Jurors: Yes. Mr. Posner: Q. In what direction were you walking? A. I was walking north - - Q. Now, tell us what happened when you got to the alley? A. Well, I was just walking along straight not noticing-paying any attention and I went to step down the steps there on the alley - there's two steps like and I got on the first one and then I didn't get to the next one, I fell. Q. And when you fell, how did you fall, in what direction? A. Well, I guess it was toward my right. Q. After you fell, did you get up unassisted by yourself? A. No sir, Mr. Whitfield was coming along and he helped me." (Italics ours.) For some reason counsel for plaintiff did not see fit to interrogate plaintiff further as to the accident, and counsel for defendant, upon cross-examination, did not touch upon that subject. Plaintiff was familiar with the situation at the place of the accident. It is plain from her evidence that she saw the steps. She made the first step safely and she was then off of the new sidewalk and upon the eleven inch tread, which was a part of the old sidewalk. The tread was only five or six inches above the surface of the alley. The step from the tread to the surface

of the alley presented an ordinary and perfectly safe situation for the pedestrian. Plaintiff does not testify that she then stepped again before falling. Her evidence does not disclose what caused her to fall. She knew that after she got on the first step that she had to take another step to reach the surface of the alley. Was her fall caused by the fact that she was "just walking along straight not noticing-paying any attention"? For aught that appears in her testimony she may have turned her ankle, or her foot may have come in contact with some object on the step. It is stated in plaintiff's brief that she "stumbled" because of the step and thereby fell, but she did not testify that she stumbled. The only other evidence as to the manner of the accident was that of Arthur Whitfield. He testified that he was walking south on Maplewood avenue, that when he was about twenty or thirty feet north of the alley he saw plaintiff approaching and that "she fell as she got to the curb of the alley." There is no evidence to show that the City had failed in its duty to keep the sidewalk in repair. In plaintiff's reply brief she states that defendant, in its brief, treated the question of contributory negligence as though it were not in issue in the case. We do not think that this statement is warranted. Defendant's counsel, in their analysis of plaintiff's testimony, call attention to the careless manner in which she was walking just before the accident. In any event, it would be against public policy to permit the City to waive such a defense. If such a practice were permitted it would inevitably tend to scandal and favoritism. However, the instant contention of the City goes much farther than the question of contributory negligence: Plaintiff was bound to prove how the accident occurred, what caused it, and that she was in the exercise of due care for her own safety at the time. She failed to make such proof.

of the alley presented an ordinary and perfectly safe situation for the pedestrian. Plaintiff does not testify that she then stepped again before falling. Her evidence does not disclose what caused her to fall. The issue that after she got on the first step that she had to take, another step as part of the same face of the alley, as was testified by the fact that she was "just walking along straight not looking-downing any attention" For aught that appears in her testimony, she may have turned her ankle, or her foot may have come in contact with some object on the step. It is noted in Plaintiff's brief that she "stumbled" because of the step and thereby fell, but she did not testify that she stumbled. The only other evidence as to the manner of the accident was that of Plaintiff's affidavit. He testified that he was walking on a sidewalk across that when he was about twenty or thirty feet north of the alley he saw Plaintiff approaching and that she fell on the curb of the alley. There is no evidence to show that the City had failed in its duty to keep the sidewalk in repair. In Plaintiff's reply brief she states that defendant, in its brief, treated the question of contributory negligence as though it were not in issue in the case. We do not think that this statement is warranted. Defendant's counsel, in their analysis of Plaintiff's testimony, call attention to the careless manner in which she was walking just before the accident. In any event, it would be against public policy to permit the City to waive such a defense. If such a practice were permitted it would inevitably tend to encourage and favoritism. However, the instant contention of the City goes much farther than the question of contributory negligence. Plaintiff was bound to prove how the accident occurred, what caused it, and that she was in the exercise of due care for her own safety at the time. She failed to make such proof.

We do not deem it necessary to pass upon a contention, raised by plaintiff, that the trial court erred in refusing to admit certain evidence offered by plaintiff.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

We do not deem it necessary to pass upon a contention
that, raised by plaintiff, that the trial court erred in
refusing to admit certain evidence offered by defendant.
The judgment of the superior court of Cook County
is affirmed.

JAMES M. HENRY

Attorney at Law, Chicago, Ill.

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SONIA ZECHMAN,
Appellant,

v.

BERNARD B. ZECHMAN; ESTHER
Z. MALKOV; ZARAH Z. KANIEF;
SOL M. ZECHMAN; MARCUS A.
ZECHMAN; PRESTON G. ZECHMAN,
and ZECHMAN AND COMPANY, an
Illinois Corporation,
Appellees.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a complaint for divorce based upon charges of cruelty. The complaint prayed for dissolution of the marriage, custody of a minor child, the return of jewelry and the contents of a safety deposit box; that certain deeds executed by plaintiff be declared null and void and that defendant be enjoined from disposing of his interest in said property; that defendant be ordered to pay plaintiff such sums of money as the court may deem reasonable and just as alimony and solicitors' fees and for the support of the minor child, and that the property rights of plaintiff and defendant be determined and adjusted. The complaint also asked that defendants Esther Z. Malkov, Zarah Z. Kanief, Sol M. Zechman, Marcus A. Zechman, Preston G. Zechman and Zechman & Company, a corporation, be directed to disclose and account for all property, of whatsoever nature, held by them for the defendant Bernard B. Zechman.

The cause came on for hearing before the chancellor, Judge Graber, and at the conclusion of the evidence offered by both sides he entered the following decree:

"Decree for Divorce

"This cause coming on for final hearing, upon the complaint and answer thereto heretofore filed, and upon evidence; and the parties appearing in open court in person

SOWIA SECHMAN,

Appellant,

v.

BERNARD B. SECHMAN; ALVIN
 E. MALIKOV; SARAH E. KANIEL;
 SOL M. SECHMAN; ARTHUR A.
 SECHMAN; FREDERICK A. SECHMAN;
 and SECHMAN AND COMPANY, INC.
 Appellees.

1. JUSTICE SOWIA, delivered the opinion of the court.

Plaintiff filed a complaint for divorce based upon charges of cruelty. The complaint prayed for dissolution of the marriage, custody of a minor child, the return of jewelry and the contents of a safely deposit box; that certain debts executed by plaintiff be paid and void and that defendant be enjoined from disposing of his interest in said property; that defendant be ordered to pay plaintiff such sums of money as the court may deem reasonable and just as alimony and solicitors' fees and for the support of the minor child, and that the property rights of plaintiff and defendant be determined and adjusted. The complaint also asked that defendant father of Malikov, Sarah E. Kaniel, Sol M. Sechman, Arthur A. Sechman, Frederick A. Sechman and Sechman & Company, a corporation, be directed to disclose and account for all property, of whatsoever nature, held by them for the defendant Bernard B. Sechman. The cause came on for hearing before the chancellor, Judge Graber, and at the conclusion of the evidence offered by both sides he entered the following decree:

"Decree for Divorce

"This cause coming on for final hearing, upon the

complaint and answer thereto heretofore filed, and upon evidence; and the parties appearing in open court in person

and by their respective attorneys, and the court having heard their testimony and the testimony of witnesses, and having heard the arguments of counsel, and being advised in the premises pursuant to the Certificate of Evidence filed herein, Finds:-

"1. That it has full and complete jurisdiction of the parties hereto and the subject matter hereof;

"2. That the plaintiff, Sonia Zechman, and the defendant, Bernard B. Zechman, are and since prior to the filing of the complaint, have been actual residents of the City of Chicago, County of Cook and State of Illinois; and have been residents of the State of Illinois for more than one year immediately preceding the filing of the complaint herein;

"3. That the plaintiff, Sonia Zechman, and the defendant, Bernard B. Zechman, were lawfully married on the 25th day of January, A. D. 1942, at Chicago, Illinois, and that as a result of said marriage there was one (1) child born of the parties hereto, said child now being sixteen (16) months of age, namely, Abby Zechman, and that said child is in the care, custody and control of the plaintiff herein, and has been since the date of its birth.

"4. That the plaintiff is a good mother and deserving of the care, custody and control of said child until the further order of the court, subject however, to such rights of visitation as the court may fix from time to time for and on behalf of the defendant, Bernard B. Zechman.

"5. That subsequent to said marriage and in violation of his marital vows, the defendant, Bernard B. Zechman, has been guilty of extreme and repeated cruelty, as charged in the complaint herein, towards the plaintiff, and particularly on the 28th day of May, A. D. 1942, the defendant struck the

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and by their respective attorneys, and the court having heard their testimony and the testimony of witnesses, and having heard the arguments of counsel, the court is of the opinion that the defendant is not entitled to a new trial.

"1. That it is a fact and each of the parties hereto and the subject matter of the complaint is as follows:

"2. That the plaintiff, Edward J. Brennan, and the defendant, Bernard J. Brennan, are the sons of the late John J. Brennan, who died on the 15th day of January, 1942, at the age of 65 years, and was born of the county of Cook and State of Illinois; and have been residents of the State of Illinois for more than ten years immediately preceding the filing of the complaint herein.

"3. That the plaintiff, Edward J. Brennan, and the defendant, Bernard J. Brennan, were jointly and severally owners of the 23rd day of January, 1942, at the age of 65 years, and was born of the county of Cook and State of Illinois; and have been residents of the State of Illinois for more than ten years immediately preceding the filing of the complaint herein. That as a result of said marriage there was born to them a child named Edward J. Brennan, who was born on the 15th day of January, 1942, at the age of 65 years, and was born of the county of Cook and State of Illinois; and have been residents of the State of Illinois for more than ten years immediately preceding the filing of the complaint herein. That the child is in the care, custody and control of the defendant, Bernard J. Brennan, and has been since the date of its birth.

"4. That the defendant, Bernard J. Brennan, is a person of good character and is a resident of the county of Cook and State of Illinois; and has been since the date of its birth. That the defendant, Bernard J. Brennan, is a person of good character and is a resident of the county of Cook and State of Illinois; and has been since the date of its birth. That the defendant, Bernard J. Brennan, is a person of good character and is a resident of the county of Cook and State of Illinois; and has been since the date of its birth.

"5. That subsequent to said marriage and in violation of his marital vows, the defendant, Bernard J. Brennan, has been guilty of extreme and repeated cruelty, as charged in the complaint herein, towards the plaintiff, and particularly on the 23rd day of May, A.D. 1942, the defendant struck the

plaintiff in her face, on her back, arms and her wrists; and on the 5th day of February, 1943, the defendant struck the plaintiff on the back with his fists; and on the 5th day of April, 1943, defendant struck the plaintiff about the face and on the back with his fists, all without provocation on the part of the plaintiff.

"6. No evidence having been submitted to the court other than that contained in the Certificate of Evidence filed herein in respect to alimony or property rights, if any, of the plaintiff; the court finds that the defendant is employed as a salesman by Zechman & Company, earning a gross income of Sixty Dollars (\$60.00) per week, and his net income is Fifty-One Dollars (\$51.00) per week after the deduction of withholding and social security taxes.

"It Is, Therefore, Ordered, Adjudged and Decreed that the said marriage and the bonds of matrimony heretofore existing between the plaintiff, Sonia Zechman, and the defendant Bernard B. Zechman, be hereby dissolved, and the same are dissolved accordingly, and said parties are, and each of them is free from the obligations thereof.

"It Is Further Ordered, Adjudged and Decreed that the care, custody, control of the said minor child, Abby Zechman, be given to the plaintiff, Sonia Zechman, subject however, to the rights of visitation of the said defendant on Sundays of each week, as heretofore ordered by this Honorable Court, and said defendant shall have the custody of said child, Abby, from the hours of 3 to 5 P.M. each Sunday.

"It Is Further Ordered, Adjudged and Decreed that predicated upon the findings herein of the earnings of the defendant, the said defendant, Bernard B. Zechman, shall pay unto the plaintiff, Sonia Zechman, the sum of Twelve Dollars (\$12.00) per week, as and for her permanent alimony, and the

plaintiff in her face, on her back, arms and her wrist; and on the 5th day of February, 1943, the defendant struck the plaintiff on the back with his fist; and on the 1st day of April, 1943, defendant struck the plaintiff about the face and on the back with his fists, all without provocation on the part of the plaintiff.

5. Defendant having been convicted in the court other than the court in the jurisdiction of which he is now in respect to the same offense, the court in which he is now in custody as a defendant in a criminal case, finding a gross income of sixty dollars (\$60.00) per week, and the defendant is entitled to the sum of \$12.00 per week for the support of himself and his family, and social security taxes.

"It is, therefore, ordered, adjudged and decreed that the said marriage be dissolved, and that the parties thereto exist- ing between the plaintiff, defendant, and the defendant Bernard H. Goehman, be legally dissolved, and the same be dissolved accordingly, and each party be free from the obligations thereof.

"It is further ordered, adjudged and decreed that the care, custody, control of the said minor child, Abby Goehman, be given to the plaintiff, Bernard Goehman, subject however, to the rights of visitation of the said defendant on Sundays of each week, as heretofore ordered by this Honorable Court, and said defendant shall have the custody of said child, Abby, from the hours of 5 to 5:15 each Sunday.

"It is further ordered, adjudged and decreed that predicated upon the findings herein of the earnings of the defendant, the said defendant, Bernard H. Goehman, shall pay unto the plaintiff, Bernia Goehman, the sum of Twelve Dollars (\$12.00) per week, as and for her permanent alimony, and the

support and maintenance of said minor child, subject however to the further order of the court.

"It Is Further Ordered, Adjudged and Decreed, predicated upon the evidence submitted pursuant to the Certificate of Evidence filed herein, that plaintiff is not entitled to any equity in any real estate or personal property of the defendant, Bernard B. Zechman.

"It Is Further Ordered, Adjudged and Decreed that the said defendant, Bernard B. Zechman, shall pay unto the plaintiff, Sonia Zechman, as and for her attorney's fees, to be allowed the said plaintiff's counsel, the sum of One Hundred Twenty-Five Dollars (\$125.00) to be paid in three (3) equal installments; one-third (1/3rd) of which shall be paid within thirty (30) days from the date hereof; an additional one-third (1/3rd) to be paid within sixty (60) days from the date hereof, and the final one-third (1/3rd) to be paid within ninety (90) days from the date hereof.

"ENTER: Jos. A. Graber
"Judge.

"Dated: 6/30, 1944" (Italics ours.)

On July 11, 1944, plaintiff filed the following notice of appeal:

"I

"Sonia Zechman, appellant above named, hereby appeals from the decree entered in this cause on the 30th day of June, A. D. 1944, whereby it was adjudged and decreed that Sonia Zechman, plaintiff and appellant, was to receive as permanent alimony and support moneys, being support and maintenance of the minor child of the parties hereto, the sum of \$12.00 per week, and further ordered, adjudged and decreed, predicated upon the evidence, that said plaintiff and appellant is not entitled to any equity of any real or person^{al} property of the defendant, appellee, Bernard B. Zechman, and further ordered,

support and maintenance of said minor child, to the further order of the court.

"It is further ordered, that the said

plaintiff be and he is hereby directed to pay

to the said defendant the sum of \$100.00 per

month, to be paid on the first day of each month

beginning on the first day of January, 1944,

until the said defendant shall have received

the sum of \$1,000.00, which said sum shall be

paid to the said defendant in full, and the said

plaintiff is directed to pay the said sum of

\$1,000.00 to the said defendant in full, and the

said defendant is directed to receive the said

sum of \$1,000.00, and the said defendant is

directed to receive the said sum of \$1,000.00

from the date hereof, and the said defendant

is directed to receive the said sum of \$1,000.00

within ninety days of the date hereof.

On July 1, 1944, the said defendant

of appeal:

1.

"Sonia Sechman, appellant, having been

from the decree entered in this case on the 1st day of June,

A. D. 1944, whereby it was alleged and decreed that Sonia

Sechman, plaintiff and appellant, was to receive as permanent

alimony and support money, being support for maintenance of

the minor child of the parties hereto, the sum of \$100.00 per

week, and further ordered, adjudged and decreed, provided

upon the evidence, that said plaintiff and appellant is not

entitled to any equity of any real or personal property of the

adjudged and decreed that the said plaintiff and appellant was to receive, as and for her attorney's fees, to prosecute the action, the sum of \$125.00 to be paid in three equal installments, 30, 60 and 90 days from the date of the entry of said decree, said sum to be paid by the defendant and appellee, Bernard B. Zechman; and it being further ordered, adjudged and decreed that the said defendant, appellee, Bernard B. Zechman, be given the right to the custody of the minor child of the parties hereto on Sundays of each week, from 3:00 to 5:00 P. M.

"II

"Appellant prays that that portion of said decree hereinabove stated may be reversed and a new trial granted.

"Wherefore, appellant further prays that a new trial be granted in connection with the aforesaid portions of the decree, and same be reversed and remanded permitting the appellant to submit evidence to the court in connection with her right, title and interest in and to real and personal property of the defendant-appellee; the right to submit evidence in connection with the signing of certain deeds by this appellant in favor of the appellee; to submit further evidence in connection with the weekly sums of money herein allowed for the permanent alimony and support and maintenance of the minor child of the parties hereto, and attorney's fees; and to submit further evidence in connection with the custody of the said minor child on Sundays from 3:00 to 5:00 P. M., now predicated in the decree, from which this appeal is taken.

"Sonia Zechman, Appellant

"By: Milton J. Sabath
"Her Attorney"

Plaintiff states her theory as follows:

"1. That the allegations as set forth in the complaint were not fully heard by the court; that the court, pursuant to

adjudged and decreed that the said plaintiff and appellant was to receive, as and for her attorney's fees, to prosecute the action, the sum of \$125.00 to be paid in three equal installments, 30, 60 and 90 days from the date of the entry of said decree, said sum to be paid by the defendant and appellee, Bernard B. Nechman; and it being further ordered, adjudged and decreed that the said defendant, appellee, Bernard B. Nechman, be given the right to the custody of the minor child of the parties hereto on Sundays of each week, from 9:00 to 5:00 P. M.

III

"Appellant prays that that portion of a final decree heretofore stated may be reversed and a new trial granted. Therefore, appellant prays that a new trial be granted in connection with the above-stated portions of the decree, and same be reversed and amended pending the appellant to submit evidence to the court in connection with her right, title and interest in and to real and personal property of the defendant-appellee; the right to submit evidence in connection with the signing of certain deeds by said appellee in favor of the appellee; to submit further evidence in connection with the weekly sums of money herein allowed for the permanent alimony and support and maintenance of the minor child of the parties hereto, and attorney's fees; and to submit further evidence in connection with the custody of the said minor child on Sundays from 9:00 to 5:00 P. M., now prohibited in the decree, from which this appeal is taken.

"Bernard Nechman, Appellant
By: Milton J. Sabath
"Her Attorney"

Plaintiff states her theory as follows:

"1. That the allegations as set forth in the complaint were not fully heard by the court; that the court, pursuant to

the statutes so made and provided, merely took evidence as to the several acts of violence as complained of to determine whether or not a decree for divorce should be granted in favor of the plaintiff; that until such time as the court had completed its evidence concerning these acts of physical violence to determine whether or not such acts constituted cruelty, as termed by the statutes, the court was without jurisdiction to proceed as to the property rights complained of and prayed for in said complaint.

"2. That it was the duty of the court, after rendering its decision in favor of the plaintiff, granting unto her a divorce upon the testimony offered and tendered in support of her said complaint, to then, either by further testimony, or by reference to a master in chancery pursuant to the statutes so made and provided, go into the questions of property rights as alleged in said complaint, and then render its decision concerning the right of the plaintiff in the property of the principal defendant, Bernard B. Zechman, if any; to go into the question of the earnings of said defendant before entering any orders of alimony or support moneys, attorney's fees, etc.; to give the said plaintiff the rights to subpoena in the books and records of the other defendants in said cause to determine whether or not any of these defendants were holding, in trust for, or for the benefit of the said Bernard B. Zechman, defendant, any properties, real or personal; to permit full testimony in connection with the other allegations in said bill concerning the personal properties of the said plaintiff, as alleged in said complaint.

"3. That it was the duty of the court, after rendering its decision in favor of the plaintiff granting unto her a divorce, upon the testimony offered and tendered in support of her said complaint, to take further evidence in connection with

the statutes so made and provided, merely took evidence as to the several acts of violence as contained in the determination whether or not a decree for divorce should be granted in favor of the plaintiff; that until such time as the court had completed its evidence concerning these acts of physical violence to determine whether or not such acts constituted cruelty, as defined by the statutes, the court was without jurisdiction to proceed as to the property and its partition and proved for the said complaint.

"2. That it was the duty of the court, after rendering its decision in favor of the plaintiff, granting unto her a divorce upon the testimony offered and rendered in support of her said complaint, to then, either by further testimony, or by reference to a master in chancery, pursuant to the statutes so made and provided, go into the question of property rights as alleged in said complaint, and then render its decision concerning the right of the plaintiff in the property of the principal defendant, Bernard A. Lechner, if any; so go into the question of the earnings of said defendant before entering any orders of alimony or support money, attorney's fees, etc.; so give the said plaintiff the right to subpoena in the books and records of the other defendants in a suit to determine whether or not any of these defendants were holding, in trust for, or for the benefit of the said Bernard A. Lechner, defendant, any properties, real or personal; to permit full testimony in connection with the other allegations in said bill concerning the personal properties of the said plaintiff, as alleged in said complaint.

"3. That it was the duty of the court, after rendering its decision in favor of the plaintiff granting unto her a divorce, upon the testimony offered and rendered in support of her said complaint, to take further evidence in connection with

the questions concerning the support of the minor child of the parties hereto, the custody of said minor child, whole or partial, and to consider the best interests and welfare of said child, through such testimony." (Italics ours.)

Plaintiff contends that "the trial court erred in refusing the plaintiff the right to present further testimony in connection with all allegations of said bill other than those pertaining to the physical violence and acts of cruelty as alleged therein;" that an oral stipulation was entered into between the parties, through their respective attorneys, that only the question of physical violence and such corroborating facts as were necessary would be introduced at the time of the trial, to determine whether or not plaintiff was first entitled to a decree for divorce; that because of that stipulation the plaintiff was prevented from offering any evidence save that which bore upon the charges of cruelty. Defendant Bernard B. Zechman denies that any such stipulation was entered into between the parties and contends that the report of proceedings shows that plaintiff and defendant gave evidence touching the property rights of the parties and the ability of the defendant to pay alimony. Counsel for plaintiff admits that the report of proceedings makes no mention of the said stipulation but he contends that certain statements of the court and counsel that are contained in the report of proceedings support his contention that there was such an oral stipulation entered into. The report of proceedings completely refutes plaintiff's statement "that the court, pursuant to the statutes so made and provided, merely took evidence as to the several acts of violence as complained of to determine whether or not a decree for divorce should be granted in favor of the plaintiff." While it is true that at the outset of the examina-

the questions concerning the support of the minor child of the parties hereto, the custody of said minor child, whole or partial, and to consider the best interests and welfare of said child, through such testimony." (Exhibit 10000).

Plaintiff contends that "the trial court erred in refusing the plaintiff the right to present further testimony in connection with his allegations of said child other than those pertaining to the physical violence and acts of cruelty as alleged therein; that an oral stipulation was entered into between the parties, through their respective attorneys, that only the question of physical violence and such corroborating facts as were necessary could be introduced at the time of the trial, to determine whether or not plaintiff was first entitled to a decree for divorce; that because of that stipulation the defendant was prevented from offering any evidence save that which bore upon the charges of cruelty; Defendant Bernard L. Nathan advised that any such stipulation was entered into between the parties and contends that the report of proceedings shows that plaintiff and defendant gave evidence regarding the property rights of the parties and the ability of the defendant to pay alimony. Counsel for plaintiff admit that the report of proceedings makes no mention of the oral stipulation but he contends that certain statements of the court and counsel that the contention in the report of proceedings support his contention that there was such an oral stipulation entered into. The report of proceedings completely relates plaintiff's statement "that the court, pursuant to the statutes so made and provided, merely took evidence as to the several acts of violence as complained of to determine whether or not a decree for divorce should be granted in favor of the plaintiff." While it is true that at the outset of the examination

tion of defendant Bernard B. Zechman the court stated that defendant's counsel was to ask only questions that bore upon the issue as to whether a decree of divorce should or should not be granted, nevertheless, the report of proceedings shows that both parties gave testimony bearing upon the property rights of plaintiff and defendant and upon the ability of the defendant to pay alimony. The report of proceedings shows that on June 21, 1944, the court adjourned further proceedings until June 22, 1944. What occurred on this last date is not shown by the report of proceedings. On June 30, 1944, counsel for plaintiff presented to the court the report of proceedings, appended to which is a verified certificate by the counsel that he has read the report "and that the same is, to the best of his recollection and belief, a true and correct transcript of all the evidence heard." The report was then filed. The findings in the decree entered by the chancellor upon the same day are all based upon the "Certificate of Evidence filed herein." There is nothing in the record to show what transpired before the chancellor upon the day that the report of proceedings was presented to him, but the decree shows that counsel for plaintiff was present. He is an experienced lawyer and he knew that the decree that the chancellor was entering determined the care, custody and control of the minor child, the amount of the alimony that defendant should pay plaintiff for herself and the support of the minor child, and that plaintiff was not entitled to any equity in any real or personal property of defendant Bernard B. Zechman. The contention of counsel for plaintiff that the trial court refused plaintiff the right to present further testimony in connection with the property rights of the parties, the custody of the child and the amount of alimony that defendant should pay finds no basis in the record. If counsel for plaintiff at the time of the entry of the decree

tion of defendant Bernard S. Beckman the court stated that defendant's counsel was to ask only questions and not argue upon the issue as to whether a decree of divorce should or should not be granted, nevertheless, the report of proceedings shows that both parties gave testimony bearing upon the property rights of plaintiff and defendant and upon the custody of the defendant to pay alimony. The report of proceedings shows that on June 21, 1944, the court signed a decree of divorce until June 22, 1944, that occurred on that date is not shown by the report of proceedings. On June 22, 1944, counsel for plaintiff presented to the court the report of proceedings, appended to which is a recitation of the facts of the case that he has read the report and that the same is, to the best of his recollection and belief, a true and correct statement of all the evidence heard. The report was then filed. The findings in the decree entered by the court on June 22, 1944, are all based upon the "recitation of facts" which is attached hereto. There is nothing in the report of proceedings before the court which would show that the report of proceedings was presented to the court and that the court knew that the decree and the same were well understood by both parties, custody and support of the minor child, the amount of the alimony that defendant should pay plaintiff for herself and the support of the minor child, and that plaintiff was not entitled to any equity in any real or personal property of defendant Bernard S. Beckman. The contention of counsel for plaintiff that the trial court refused plaintiff the right to present further testimony in connection with the property rights of the parties, the custody of the child and the amount of alimony that defendant should pay finds no basis in the record. If counsel for plaintiff at the time of the entry of the decree

desired to offer further evidence, why did he not make his offer in a proper way, have the chancellor rule upon the offer, and preserve the rights of plaintiff by a report of proceedings? We must assume from the record before us that counsel did not at the time the decree was entered make any offer of further proof. For aught that appears in this record plaintiff at that time was satisfied with the provisions of the decree. Furthermore, the chancellor had jurisdiction to amend or change the decree for a period of thirty days after it was entered and during that time plaintiff had the right to present to the chancellor the matters she urges here.

Upon the record presented to us the decree should be affirmed and it is accordingly so ordered.

DECREE AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

desired to offer further evidence, why did it not make this
offer in a proper way, have the objection taken from the
offer, and preserve the rights of the plaintiff by report of
proceedings. We must assume that the plaintiff knew as that
counsel did not do so. The plaintiff's counsel made any
offer of further proof. For what it is worth in this
record plaintiff's counsel made no offer of further proof.
ations of the record. With respect to the offer of further
decision to amend or change the pleadings, the plaintiff had
days after it was entered in the record. The plaintiff had
the right to present to the court the evidence in support of the
here.

Upon the record presented to the court the plaintiff's
affirmed and it is accordingly so ordered.

Sullivan, P. J., and Judge, J., concur.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
MAY TERM, 1944

Josiah Treharne,
Appellee,
vs.
Joseph E. Klint,
Appellant.

Appeal from
Circuit Court of
Will County

324 I.A. 546

Dove, P.J.:

Josiah Treharne, appellee, by a written lease, rented a store room and basement in the city of Joliet (except a small reserved space in the basement), the buildings in the rear, and certain machinery and equipment, to appellant, Joseph E. Klint, for use as a cleaning, dyeing and tailoring establishment. The lease was executed on August 22, 1936, for a two year term beginning September 1st, 1936, with an option for a three years extension. Appellant occupied the premises for the five years period, and for one additional month under a special extension agreement, and vacated the property on September 30, 1941.

Appellee instituted a suit against appellant in the circuit court of Will County charging him with having damaged both the building and equipment, and with failing to return the same in the condition required by the lease. Appellant filed a counter claim for damages on account of appellee's failure to heat the building in the rear containing the cleaning rooms. The cause was heard

by the court without a jury, and a judgment was entered dismissing the counter claim, and awarding damages to appellee in the sum of \$2459.98. From that judgment the defendant appeals.

The pertinent portions of the lease provide:

(Par. 3) After the description of the premises, are the words: "together with machinery and equipment now located and used in a cleaning, dyeing, and tailoring establishment, (and including delivery equipment) now situated and located in the leased premises, and used in connection with the above described cleaning, dyeing and tailoring establishment."

(Par. 4) List of machinery, furniture and equipment consisting of more than one hundred items beginning with a National Cash Register and ending with a Ford Delivery Truck.

(Par. 5) "to have and to hold, The above described premises with the appurtenances and said equipment and fixtures * * *, to be occupied for and used for the purpose of operating a cleaning, dyeing and tailoring establishment, and no other."

(Par. 12) "The Lessee agrees to keep the machinery in good repair and to return the same to the Lessor at the termination of this Lease, or any extension thereof, in as good condition as when he found it, ordinary wear and tear expected."

(Par. 13) "Lessor agrees to install a separate boiler for use in connection with the operation of the Cleaning Plant which shall be separate and distinct from the heating plant. Any repair or replacement, if it shall be necessary to be made in connection with said boiler during the term of this Lease, shall be made and paid for by the Lessee."

(Par. 15) "The Lessee agrees to return the premises covered by this Lease, as well as the machinery covered hereby, at the termination of this Lease, or the extension thereof, to the Lessor in as good condition as they now are, ordinary wear and tear and inevitable or fire or other casualty expected."

(Par. 16) "It is further agreed that during the term of this Lease, and any extension thereof, that the Lessor will furnish the heat necessary for the use and occupation of said building."

(Par. 29) "And it is further covenanted and agreed, by and between the parties, that the Lessee shall pay and discharge all costs and attorney's fees and expenses that shall arise from enforcing the covenants of this indenture by the Lessor."

The judgment embraces the sum of \$1062.50 for reconditioning the plant and putting it in operating condition; \$345.48 for repairing the boiler furnished by appellee under paragraph 13 of the lease; \$72.00 for cleaning the premises and removing rubbish;

\$230.00 as rental for the month of October, 1941; and \$750.00 for attorney's fees. The counter claim was for \$7000.00.

The store room contained the office and the finishing room. The boiler room was a separate building in the rear, and back of it was another building of two rooms, one for wet cleaning, and the other dry cleaning. Steam pipes ran from the boiler room to the finishing room and to the wet and the dry cleaning rooms. An electric motor in the boiler room operated a main shaft from which the various machines derived their power. Appellee operated the business from February, 1922 until October, 1933, when he sold it, reclaiming it in August, 1934 through chattel mortgage foreclosure, after which he again conducted it for several months, and then leased it to a tenant in 1935, who operated it until appellant took possession. Throughout appellant's tenancy appellee occupied the west half of the first story of the main building with a stoker business. During the term, appellant enclosed the space between the boiler room and the main building by a roof and walls with glass partitions. He removed parts of the equipment, added other equipment, and testified that when he vacated the premises the leased equipment was less than 20% of the entire equipment. The lease provided that any equipment installed by appellant might be removed by him at the termination of the lease, but there is no provision authorizing any alterations or the removal of any of the leased equipment.

Appellant's business expanded, and in 1937 the dry tumbler, a machine about 5 feet wide, 6 1/2 feet high, and 9 or 10 feet long, and weighing about two tons, was moved by appellant from the cleaning and spotting rooms and stored in the basement of the main building. Two smaller dry tumbler units, and later a third one, were substituted and used by appellant during the remainder of his occupancy of the premises, and were taken away



when he vacated, leaving the leased dry tumbler in the basement. Two other machines, a washer and an extractor, with their counter shaft, were moved from the dry cleaning room to the wet cleaning room, connected up and used there by appellant, and so left when he vacated the premises. The washer weighed about 1000 pounds. He substituted a 7½ horse power electric motor for the leased 5 horse power motor which drove the main line shaft, and left the leased motor on the floor of the boiler room. The boiler furnished by appellee under paragraph 13 of the lease was disconnected when another larger boiler, stoker fired, with automatic controls, purchased by appellant from appellee, was substituted, and the former was left disconnected from the smoke stack and from the steam pipes. The testimony shows that about 150 feet of steam pipe would have to be installed in order to put the plant in operating condition. Appellee testified that the boiler was minus its appurtenances, and in bad repair; that 45% of the wood floor of the finishing room was rotted out by leaks from the pressing machines, and that it would be necessary to replace practically three fourths of the floor; that the steel platform for the electric motor was hanging partially disconnected from the wall; that some appurtenances of the fire prevention doors were missing, and that they would not work; that the drive belt was gone and most of the other belts were disconnected; that several articles mentioned were gone, some windows broken, and others missing. He later corrected his testimony as to the windows and withdrew any claim as to them. He further testified that when appellant went into possession, the machinery and equipment was all connected up, and that it and the premises were in suitable operating condition, which is admitted by appellant.

Appellant claims that the lease does not require him to



return a "going dry cleaning plant" to appellee, but only that he shall return the premises and the machinery in as good condition as when received by him, ordinary wear and tear, inevitable accident, etc., excepted. He argued that to hold him liable for putting the displaced machinery back in place connected up in operating condition would be to read provisions into the lease which are not there, and that a lease is to be construed most strongly against the lessor and in favor of the lessee if there is any doubt or uncertainty as to its meaning. The complete answer to these contentions is, first, that there is no doubt or uncertainty as to the meaning of these terms of the lease. It is elementary that in such a case there is no need or room for construing the meaning by the legal rules laid down for construing ambiguous written instruments. Second, if appellant's contentions be correct, he could disconnect and remove all the machinery and equipment from their settings, and leave them stored together or scattered through the plant away from their proper places, without being liable under the covenants of the lease. The ownership of the land, buildings, machinery and equipment mentioned being in appellee, and the nature of the latter and of their employment and attachment to the real estate characterize them as a part of the premises. It is so obvious that returning dismantled premises, the machinery and equipment of which were all connected up and in operating condition when entered upon, is not returning the premises in as good condition as when received, as to need no further comment. So, too, returning premises or equipment in need of repairs, which was in good repair when received, is likewise covered by the express provisions of the lease. The fact that the two provisions are in separate paragraphs does not detract from their manifest meaning and intent. The claim that the dry cleaning washer and

1. *Phragmites australis* (Cav.) Trin. ex Steud.

(2) $\alpha = 0$

the extractor were employed as wet cleaning apparatus at the termination of the tenancy, and that requiring them to be restored to the dry cleaning room would be to require the return of "a dry cleaning plant", to which there is no allusion in the lease, is manifestly, upon the face of it, without any merit.

As to the item of \$1062.50, T. J. Neil, the president of Joliet Boiler and Machinery Company, which is engaged in the boiler business, special manufacturing, and the repair and installation of machinery and equipment, testified that he had installed an entire cleaning and dyeing plant in 1915, a washer in ~~another~~ plant in 1938, and that he had had forty years experience in estimating the cost of installing and repairing machinery and equipment; that he examined the machinery and equipment in appellee's plant in February, 1943, and estimated the cost of replacing and connecting up the dry tumbler, extractor, washer, and electric motor, so as to be used in the business, at \$1062.50. He testified that he divided his price into six units, moving the extractor and the washer from the west to the east room, moving the dry tumbler from the basement, repairing the boiler and smoke stack, installing the motor platform, the steam lines, return lines, and electric conduit and wiring. He detailed the necessary things to be done, including a new breeching or smoke pipe for the boiler, the furnishing of one new belt, the furnishing and installation of about 150 feet of steam pipe, ranging in size from one half inch to two inches, including elbows, valves, miscellaneous fittings, and labor. He testified that some of its electric conduit was in the boiler room, but that about 25% to 30% of it was missing, and that some of the wires were out of the conduit. On cross examination he said that he did not remember the cost of the individual job of moving and connect-

ing up the extractor, or the price of the pipe included in his estimate; that he used the pipe price of 1943, and did not know how it compared with the price of September 1, 1941; and, at the time he testified, that he was unable to break down the estimate and tell how much it would cost to put the boiler back into operation. His testimony is criticised by appellant on these accounts, but he was not asked whether he could produce the figures used in his calculation of cost. He further testified that his estimate was the same as if he had been asked to make it in October, or November, 1941. A lump sum estimate is competent evidence. (Hartford Deposit Co. v. Calkins, 109 Ill. App. 579, 586, and cases cited.) Furthermore, appellant is in no position to complain that the estimate was a lump sum, for the reason that the estimate of his own witness, hereinafter mentioned, was on the same basis.

Homer Olds, a witness for appellant, with twenty years experience in installing the type of machinery and equipment in controversy in more than 100 plants, examined appellee's plant on October 10, 1941, at appellant's request. He was then completing the plant for appellant to which he moved from appellee's premises. He testified that he furnished an estimate of transferring the washer, the extractor and the tumbler and connecting them up for service; that the estimate included all necessary work in getting the machinery back into place, getting it working and whatever little repairs were necessary; and that his estimate, given to appellant, was that it would not exceed \$200.00; that he did not go into details while he was on the premises, and made no memorandum of his figures; that he estimated the labor side, and made no list of materials needed, but



knew what they were, and that the job would have taken a day and a half; that he does not do chimney work, and that one would not have to include a breeching to operate the boiler, and if a hole were knocked in the boiler room wall the smoke would go out into the alley; that his estimate did not include a smoke stack installation, but included three try cocks and a steam gauge. He and appellant testified to the effect that when the estimate was given, appellee said he did not know whether he would continue to operate a cleaning plant or convert it to some other line of business, and would let them know around the first of the year. Appellee testified that appellant offered \$200.00 to replace and reconnect the machinery and that he agreed to accept it provided appellant paid him the additional claims for repairing the floors, hooking up the boilers, repairing the windows and doors, and replacing the missing articles. Appellant denied that appellee made that statement. A carpenter of 25 years experience, testified that he estimated the cost of repairing the floor, windows, window lights, and fire doors at \$568.00. It does not appear what part of this amount was attributed to window repairs, the claim for which was withdrawn. He also testified that his estimate was based on February, 1943 prices, which were about 20% higher than those of October, 1941.

Appellant's son testified that it was necessary to replace some steam pipes which broke when new pressers were being installed in the finishing room, soon after appellant took possession, and that the boiler breeching was taken up on top of the building, underneath the porch, when the boiler was put out of service. He did not testify that the breeching was in usable condition when the plant was vacated. It appears from the evidence that the tires on the delivery truck stored

in the basement were wholly useless and the battery was missing when appellant moved out. One of the parties to whom appellee had formerly sold the plant testified that he could not use the truck because the pistons were rusted in the block; that he worked for appellant from February, 1939 until he vacated the premises, and that during all that time the tires were rotten, and that the truck was not used. The tenant who preceded appellant testified that he used the truck every day in his business; that when he left, two days before appellant took possession, the truck was in good operating condition, the machinery was hooked up, and the floor was in good condition, without holes. It was stipulated that another witness, if present, would testify that early in October, 1941, he cleaned out the finishing room and found many holes in the floor in the north part of the room, from one to two feet in extent.

While there is some conflict in the testimony, the fact that the plant was in operating condition when appellant took possession, and was left in a dismantled condition when he vacated it, is not denied. The trial judge saw and heard the witnesses, and was in a better position to observe their demeanor and to judge of the credibility and the weight to be given their testimony than a court of review, which does not have that opportunity, and upon an examination of the testimony we are unable to say that the finding of \$1082.50 due appellee on account of the items mentioned is against the weight of the evidence.

Appellant claims that inasmuch as the boiler was not a part of the equipment itemized in the lease, the several clauses of the lease as to returning in as good condition as when received, are not applicable to the boiler. Paragraph 13 of the

lease expressly calls for any necessary repairs or replacements. The evidence shows that it was in good condition when installed, and that when appellant vacated the premises, the boiler was left stripped of its attachments, and with such an accumulation of scale that it was unsafe to use it. The estimate of \$345.48 for repairing the boiler was made by Mr. Neil, during the trial, and he testified that it would be the same as of October, 1941. Appellee testified the boiler was in the same condition when inspected as it was when appellant vacated the premises. Edmund Hirner, a boiler inspector for the Hartford Steam Boiler Inspection Insurance Company testified that he inspected the boiler periodically about every four months after appellant took possession of the premises; that on February 20, 1941, he inspected it, and that the scale in the fire leg was about one half inch thick, the leg being almost completely scaled, and that the scale on the lower tube sheets was about one fourth inch thick; that the scale was hard and it would have been unsafe to operate the boiler; and that he had recommended that new tubes be put in the boiler. Mr. Olds' testimony that at the time of his estimate, appellee said the boiler was in good condition does not militate against the fact that it was not. Nobody testified that the boiler could be repaired for less than \$345.48, and we observe no reason for disturbing this part of the judgment.

The \$72.00 awarded appellee for cleaning the plant and removing rubbish is objected to on the ground that appellant's son testified that the place was swept and the cleaning rooms were washed with a hose on the day that the plant was vacated, and that there was an accumulation of rubbish in the basement when appellant took possession. There is testimony on the part of appellant to this effect, and on the other hand, there is testimony

on the part of appellee that the premises were cleaned, and the rubbish, if any, in the basement, was cleaned up, the morning before appellant took possession; that appellee paid two of his employees \$72.00 for 5 days work in cleaning up the plant and hauling away the debris and rubbish. This is another instance of where the trial court saw and heard the witnesses, and we observe no reason for disturbing the amount awarded.

Under the claim that the court erred in awarding appellee \$230.00 as rent for the month of October, 1941, appellant urges that he gave appellee due notice that he would terminate the tenancy on September 30, 1941, which is the day he vacated the premises. The special extension agreement, under which he occupied the premises during the month of September, 1941, provided for double rent, and contained a clause: "Lessee shall have the right to terminate this agreement upon the giving of two weeks' notice in writing to the Lessor, *****". Appellant prepared a notice to appellee that he would terminate the tenancy on September 30, 1941, and sent it to appellee by registered mail on September 13th. He testified that he saw it on appellee's desk on the morning of September 14th; that appellee was not there, and that he did not learn until a couple of days after he sent the notice that appellee was out of town; that the girl in charge told him. Appellee testified that about September 8th, he took some hunting and fishing clothes to appellant's place to be cleaned and told him he was "leaving Sunday on a two-weeks fishing trip"; that he picked up the clothes on Saturday morning and again discussed his trip, and that he was gone from September 14th until the night of September 30th. Appellant denied such conversations, and testified that shortly after the extension agreement was executed, he told appellee that he would probably be ready to operate the new plant in about two weeks. ~~My letter stating that~~ The extension agreement, like the

lease, was under seal. There is no testimony that tends to show that appellee waived its requirement for a written notice of termination. A written notice was therefore necessary to terminate it. (Becker v. Becker, 250 Ill. 117, 124; Wagner v. McClay, 306 Id. 560, 563.) Appellant invokes the doctrine that notice by mail if actually received is a sufficient compliance with a requirement for written notice, although a statutory notice is required to be served personally. (16 R.C.L. 1112, par. 629.) Under this doctrine it was incumbent upon him to show that the notice was duly received by appellee. Appellant did not testify that the envelope in which he mailed it had been opened when he saw it on appellee's desk, and from his own testimony it appears that appellee was not there. There is no testimony which tends to show that he visited his office at any time after the notice was mailed and before October 1st, or that he ever received the notice before the latter date. The offices of appellant and appellee were in the same building, and no reason is apparent why appellant could not have delivered the notice to appellee in person, having chosen to attempt delivery otherwise, it was incumbent upon him to show due receipt thereof by appellee, which he failed to do. The trial court did not err in awarding rent for the month of October, 1941.

One of the attorneys for appellee testified in detail as to the preparation of the case, including conferences with appellee, conferences with appellant's attorney, interviewing witnesses, working on the law and the facts, preparation of the pleadings, preparing for and attending the pre-trial conference and resisting an application for continuance, embracing time spent on 26 separate specified days between January 1942 and May 19, 1943; and that he also worked in preparing for trial on various other days between May 19, 1943, and June 3, 1943. The

trial began on the latter date and consumed four days. The testimony is voluminous and covers 493 pages of the record. At the close of the testimony, appellant's motion to amend his answer was resisted, briefs were filed, and motion for a directed verdict, for judgment notwithstanding the verdict, for a new trial, and in arrest of judgment, were interposed. The case was strongly contested from beginning to end. The witness testified that the value of the services is \$750.00 and is the usual, reasonable and customary charge. No testimony to the contrary was offered by appellant. Under such circumstances we cannot disturb the finding of the trial court as to the fee.

Appellant's counter claim is based on paragraph 16 of the lease. His contention is that thereunder appellee was obligated to heat, not only the main building, but also the building in the rear, containing the wet and the dry cleaning rooms; that there is no ambiguity in the provision; and that if construed as ambiguous, the ambiguity must be construed in favor of the lessee and against the lessor. No complaint of a failure to heat the main building is made. It is manifest that under the 13th and the 16th paragraphs of the lease there is an ambiguity as to what part of the premises appellee agreed to heat. It is a familiar rule that in construing an ambiguous instrument, all of its provisions are to be construed together to determine the intention of the parties as expressed therein. (*Szulerecki v. Oppenheimer*, 283 Ill. 525, 531, 532; *Chicago Home for Girls v. Carr*, 300 Id. 478, 483.) Among the rules for construction of ambiguous contracts is the one that all grants, deeds and leases are to be most strongly construed against the grantor if there is any doubt or uncertainty as to the meaning of the grant. (*Goldberg v. Pearl*, 306 Ill. 436, 440; *Manchester Marble Co. v. Rutland Railroad Co.*, 100 Vt. 232, 136 At. 394; 51 A. L. R. 628.) However, rules of construction have

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AND ARCHITECTURE

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been adopted by the courts, not as laws governing decisions in particular cases, but for the purpose of aiding the court in determining the intention of the parties to the contract, which is always the determining factor if not violative of some positive rule of law or of public policy. It has long been settled that where there is an ambiguity in a written instrument, the court may consider oral evidence of the circumstances surrounding the parties at the time the instrument was executed, for the purpose of determining the meaning of doubtful expressions therein. (Gage v. Gameron, 212 Ill. 146, 163; Northern Illinois Coal Corp. v. Cryder, 361 id. 274, 284; Lehmann v. Revell, 354 id. 262, 278.) Although, as argued by appellant, a written contract cannot be varied or contradicted by parol evidence of an oral agreement entered into before or at the time of making the contract, parol evidence which does not change a written contract, but which makes clear its uncertain, ambiguous, or incomplete provisions, is admissible. (Stone v. Mulvaine, 217 Ill. 40 45; Scholbe v. Schuchardt, 292 id. 529, 534.) It is also the rule that if ambiguous terms are used in a written agreement, parol evidence is admissible to show the construction placed on the instrument by the parties, and that such interpretation is often entitled to great weight, and is persuasive of the true construction to be accorded the contract. (Armstrong Paint and Varnish Works v. Continental Can Co., 301, Ill. 102, 107; Northern Illinois Coal Corp. v. Cryder, supra.) It is also well established that even though an instrument is executed independently of any prior agreement of larger scope, other agreements and circumstances preceding its execution may be considered in order to determine the intention of the parties in their use of specific words or clauses. (Koelmel v. Kaelin, 374 Ill. 204, 210.)

At the time of the execution of the lease, the main

building, the cleaning plant and the machinery were all operated and heated by a single Kewanee boiler located in the boiler room, under which there was no basement. During September, 1936, or shortly thereafter, while appellant was in possession, the boiler was replaced by the one furnished by appellee. Later in the fall, appellee installed a separate boiler in the basement of the main building for heating only the two store rooms and the apartments above them. Appellee testified that he had never used the radiators in the cleaning room, because the rooms were sufficiently heated by the dry tumbler, and in which they kept steam all night in the winter time; that appellant examined the dry tumbler before he moved into the premises and they had a discussion about it; that they had a conversation on or about September 8, 1936, at which they discussed the method by which appellee had operated the cleaning rooms, and that appellant said he was satisfied to continue to use the excess heat from the dry tumbler to heat the cleaning rooms; that he (appellee) told appellant that the boiler he had selected to heat the main building would not be large enough to furnish heat for the dry cleaning rooms, and appellant said this would be satisfactory, and that if additional heat was needed at night, when the plant was not in use, he would furnish it from his boiler; that appellant told him to install the boiler he had selected to heat the two store rooms and the apartments above them, and that he would use the dry tumbler for heating the cleaning rooms as appellee had done; and that the cleaning room radiators were disconnected in September, 1936. Appellant denied ever having such a conversation with appellee, who further testified that the installation of the dry tumblers substituted by appellant cut the heating capacity 70%.

Appellant and his son testified that every year they repeatedly complained to appellee about the lack of heat in the

cleaning rooms. Appellant also testified when appellee took out the Kewanee boiler, he said he was going to put in one that would heat the upstairs, the finishing room and the cleaning plant; that after it was installed appellee said it was too small and that he would put in another so that he would have no more trouble with the heat, and did install a larger boiler, but never connected it to the cleaning plant. Appellee testified that the heating boiler first installed was replaced about 20 months later, because of two cracked sections. The reason for the replacement is corroborated by the testimony of appellant's son. Appellee also testified that appellant never made any complaint about the heat until the latter part of August, 1941, while the parties were negotiating for the four months extension of the lease.

Appellant does not complain that the cleaning rooms were not amply heated by the dry tumbler in the day time, and his son testified to the effect that they were. The counter claim is based only on the freezing and bursting of steam pipes at night when the plant was not operating, consequent upon shutting down the boiler at night, the cost of replacing the pipes, and the loss of operating time in so doing. Appellant's son testified that it would have been necessary to maintain 70 pounds pressure to force steam through the dry tumblers; that it would take from 25 to 550 gallons of water to keep up a few pounds of steam during the night, and they were afraid of blowing up the boiler. This loses sight of the fact that the boiler installed by appellant was stoker fired, with automatic controls, which he testified could be adjusted as to pressure. Furthermore, it is not shown or claimed that there was any freezing in the plant before appellant took possession. If the old dry tumbler, or the

ones substituted by appellant, made it necessary to maintain a steam pressure of 70 pounds, no reason is apparent or offered why appellant could not have reconnected the radiators independently of the dry tumblers, and heated the rooms by very low pressure. It is common knowledge that steam heating radiators can be, and are almost universally so heated. He knew, from September, 1936, that the radiators were disconnected. He acquiesced therein, and never made any complaint about the disconnection. He claims there were freeze-ups each winter. No record of them or their cost was kept until 1939, and no effort was made to deduct such cost, or any damages for loss of operating time, from the rent as it was paid, at any time during appellant's occupancy of the premises, nor until this suit was instituted, including the time when the parties were discussing appellant's liability for rehabilitating the plant.

The circumstances surrounding the parties when the contract was made, the construction placed upon section 16 of the lease by them at that time and thereafter until this suit was brought, and the testimony of the witnesses, even though conflicting as to the actual agreement, demonstrate that the covenant was intended by both parties to cover the furnishing of heat by appellee for only the main building. This construction is supported by the use of the singular term "building" in the covenant. It is also to be observed that section 13 provides that the boiler to be installed by appellee "shall be separate and distinct from the heating plant". In our opinion, the record indicates that the counter claim was interposed as an after-thought. We find no error in its disallowance.

Various claims are made as to error in the admission of testimony. The trial was by the court, without a jury, and the presumption is that the court considered only the competent



testimony. In our opinion, it was sufficient to overcome any presumption arising from the rule that a grant is to be construed mostly strongly against the grantor or lessor. None of it tended to vary or contradict the terms of the lease, but on the contrary, tended to make its provisions clear, and under the rule, it was admissible. The judgment of the trial court is affirmed.

Judgment affirmed.

42990

IN THE MATTER OF THE ESTATE
OF OSCAR J. RUH, Deceased.

THE FIRST NATIONAL BANK OF
CHICAGO, as executor,
Petitioner below,
Appellant,

v.

WALLY REXHAUSEN RUH,
Respondent below,
Appellee.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

324 T.A. 547

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Oscar J. Ruh died October 4, 1942 and the First National Bank of Chicago was named executor of his will, which was admitted to probate. Upon examination of Ruh's safety deposit box shortly after his death an officer of the bank discovered that certain principal notes and interest coupons in the face amount of \$8,356.26, that he had reason to believe belonged to the decedent, were missing from said box. Upon investigation the executor learned that Wally Rexhausen Ruh, decedent's wife, had the notes and interest coupons in her possession. In conformity with sections 183 and 184 of the Probate Act (pars. 335 and 336, chap. 3, Ill. Rev. Stat. 1943) the First National Bank (hereinafter sometimes referred to as petitioner) filed a petition in the Probate court to compel Wally Rexhausen Ruh (hereinafter sometimes referred to as respondent) to show how and by what means she obtained title to the securities in question and to deliver them to it as executor if the court should determine that Ruh was the rightful owner of them at the time of his death. On July 2, 1943 the Probate court entered an order adjudicating title to the securities to be in Wally Rexhausen Ruh, from which order the executor perfected an appeal to the Circuit court. The cause was tried in the Circuit court without a jury and a judgment order was entered November 17, 1943, which directed "that

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the petition of the First National Bank of Chicago executor of said estate for citation against Wally Rexhausen Ruh be dismissed at petitioner's costs for failure to prove on the part of petitioner that the ownership of the securities mentioned therein was in Oscar J. Ruh at the time of his death." This appeal by the executor seeks to reverse the judgment order of the Circuit court.

The facts are simple and undisputed. It is admitted that Ruh owned the securities involved herein when he removed them from his safety deposit box on September 30, 1942. He went to his box on that date, took out the notes and interest coupons, placed them in an envelope, which he put in his pocket, and went home. His wife accompanied him on his trip to the safety deposit box because he was ill. That night Ruh became very ill and was worse the next day. The notes and interest coupons remained in decedent's pocket from the time he removed them from the box until after the doctor told him the next day that he would have to remain in bed for sometime. Mrs. Ruh, called as a witness by the executor under section 60 of the Civil Practice Act (par. 184, chap. 110, Ill. Rev. Stat. 1943), testified that her husband gave her the envelope containing "the notes" on October 1, 1942; that she "did exactly what he told me to do *** I put the envelope in the place where he told me, that was in the closet, because that is the safest place, he said, when everybody walks in and out, and he wanted to have it there, not in his bedroom, where the nurse and the doctor go around." The foregoing comprises all the evidence in the record concerning what occurred in connection with the decedent's notes and interest coupons from the time he removed them from his safety deposit box until he died four days later on October 4, 1942.

Although respondent's counsel stated at the opening of

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the hearing in the Circuit court that she claimed the securities as a gift inter vivos from her husband, according to her own testimony he never delivered them to her during his lifetime. She offered no evidence to establish a valid gift but presented a motion at the close of petitioner's evidence to dismiss the petition for citation because the executor had failed to prove that the ownership of the securities was in Ruh at the time of his death. As has been seen the trial court sustained her motion and entered the order of dismissal from which this appeal is prosecuted.

The executor contends that Ruh's ownership of the securities at the time of his death was sufficiently shown by the evidence and that the burden was on the respondent to show by clear and convincing evidence that her husband made a gift of them to her in his lifetime, as she claimed.

It is rather difficult to glean from respondent's brief her theory as to why the judgment of the trial court should be sustained. Although it is conceded that she made absolutely no attempt to prove any of the essential elements of a gift, it is suggested that her husband might possibly have made a gift of the securities to her during the last three days of his life. The only possible theory that she can rely on is that the executor failed to prove that Ruh continued to own until his death the notes and interest coupons, which he admittedly owned and had in his possession three days before he died.

The two essential elements of a gift are the delivery of the property and the intention of the donor to transfer the ownership of same to the donee. While it is true that where a husband delivers personal property to his wife during his lifetime and she is in possession of it after his death, there is a presumption of his intention to transfer the title to such property to her, that rule can have no application here because

the hearing in the circuit court that she claimed the property as a gift from her husband, according to her own testimony he never delivered it to her during his lifetime. She offered no evidence to establish that she presented a motion at the close of testimony to dismiss the petition for citation because the owner has failed to prove that the ownership of the second lot was in her at the time of his death. As has been seen the trial court sustained her motion and entered the order of dismissal from which this appeal is prosecuted.

The executor contends that this ownership of the second lot at the time of his death was established by the evidence and that the action was on the response to show by clear and convincing evidence that the second lot was a gift of him to her in his lifetime, as she claimed.

It is rather difficult to glean from respondent's brief her theory as to why the judgment of the trial court should be sustained. Albeit it is contended that the gift is absolutely no attempt to prove any of the essential elements of a gift, it is suggested that her husband might, casually have made a gift of the second lot to her during the last three days of his life. The only possible theory that she can rely on is that the executor failed to prove that she continued to own until his death the notes and interest coupons, which he admittedly owned and had in his possession three days before he died.

The two essential elements of a gift are the delivery of the property and the intention of the donor to transfer the ownership of same to the donee. While it is true that where a husband delivers personal property to his wife during his lifetime and she is in possession of it after his death, there is a presumption of his intention to transfer the title to such property to her, that presumption can have no application here because

there was no delivery.

Instead of resolving the issues against the respondent because of her utter failure to prove any of the essentials of a valid gift, the trial court was misled into adopting her erroneous theory that the executor had failed to prove that Ruh's ownership of the securities continued during the last three days of his life.

There can be no question but that the notes and interest coupons belonged to Ruh at the time of his death. He owned them three days before he died when he told his wife to remove them from his pocket to the closet for greater safety and they were still just as much his and in his possession in the closet as they were when they were in his pocket. In the absence of any showing that the decedent divested himself of the ownership of the notes and interest coupons during the last three days of his life there is a presumption that his ownership continued until he died. If the rule were otherwise, there would be imposed upon the executor in the instant case the unfair, unjust and practically impossible burden of negating the possibility of the decedent having made a gift of the securities to his wife a day or two before he died.

Respondent urges that her mere possession of the securities after her husband's death is prima facie evidence of her ownership which the executor failed to overcome by contrary evidence. The only authority cited in support of this contention is Martin v. Martin, 174 Ill. 371. In Rothwell v. Taylor, 303 Ill. 226, in discussing the Martin case, the court said at p. 231:

"Plaintiff contends that the undisputed proof of her possession of the property before her aunt's death makes a prima facie case of her ownership, which defendant failed to overcome by contrary proof. In support of this contention great reliance is placed on Martin v. Martin, 174 Ill. 371. That case sustained a gift of unindorsed negotiable paper in litigation which arose after the death of the donor between

three days of his life.

303 Ill. 226, in discussing the Smith case, the court said at

"Plaintiff contends that the undisputed proof of her possession of the property before her aunt's death makes a prima facie case of her ownership, and defendant failed to overcome by contrary proof. In support of this contention great reliance is placed on Martin v. Martin, 174 Ill. 371. That case sustained a gift of unadorned negotiable paper

the executors and the donee. Aside from the fact that the donee was in possession and claimed the property before the death of the donor there was other testimony tending to show the donor delivered the notes to the donee some time before his death with intent to pass title. The court made some observations on the presumption of title from possession and the effect that should be given to it, but it was evidently not intended to lay down a rule of law different from that found in other decisions of this court and the courts of other States generally. The decision of the case was correct, for other proof than possession of the donee warranted the conclusion that the donor delivered the notes to the donee with intent to pass the title thereby."

The court then went on in the Rothwell case to state at pp. 231 and 232 the universal rule applicable to a gift inter vivos of personal property:

"In Millard v. Millard, 221 Ill. 86, a mother, after the death of her son, claimed title to certain money and securities as a gift from him. She obtained the possession before her son's death. This court held the burden was on the donee to prove the gift by evidence not equivocal or uncertain, and said: 'It was essential to prove that there was an intention on the part of the deceased to transfer the title and right of possession of the property to Jane H. Millard and that there was a delivery of the subject matter of the gift by which he parted with all control over it.' That is the universally recognized rule by courts and text writers, we believe."

We are impelled to hold that it was clearly shown that the ownership of the notes and interest coupons involved herein and described in the executor's petition for citation was in Oscar J. Ruh at the time of his death, that the right to said property is in the executor and that the trial court erred in dismissing the executor's petition for citation.

The judgment of the Circuit court of Cook county is reversed and the cause is remanded with directions to order the respondent, Wally Rexhausen Ruh, to deliver the notes and interest coupons in question to the executor and in the event that she has collected upon said notes or interest coupons, or any of them, to deliver the proceeds thereof to said executor.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Friend and Scanlan, JJ., concur.

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324 I.A. 547²

IN THE MATTER OF THE ESTATE
OF OSCAR J. RUH, Deceased.

THE FIRST NATIONAL BANK OF
CHICAGO, as executor,
Petitioner below,
Appellant,

v.

WALLY REXHAUSEN RUH,
Respondent below,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE ADDITIONAL OPINION
OF THE COURT.

The respondent, Wally Rexhausen Ruh, filed a petition for rehearing in which she urges that "the final judgment against the respondent in this court is erroneous" in that "the order of dismissal below having been entered upon the motion of the respondent to dismiss the petition at the end of the petitioner's case, the finding that said motion was wrongfully sustained requires that the cause be remanded for further hearing."

The executor of her husband's estate having been advised that respondent had in her possession the securities involved herein, which it had reason to believe belonged to the decedent at the time of his death, filed a petition for citation against said respondent requiring her to justify her possession and retention of such securities. Upon the hearing on the petition for citation in the circuit court respondent's counsel stated that she claimed the securities as a gift inter vivos from her husband, but when she was called as a witness by petitioner under section 60 of the Civil Practice Act she admitted that her husband did not deliver the securities to her as a gift but that he merely turned them over to her to place in a closet to keep them safe for him. While it is true that it was upon respondent's motion made at the close of petitioner's evidence that the trial court improvidently entered the

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IN THE MATTER OF THE ESTATE OF
JAMES A. HARRIS, deceased.

THOMAS HARRIS, JR.,
Petitioner.

THE FIRST NATIONAL BANK OF
CHICAGO, as executor,
Petitioner.

WILLIAM HARRIS, JR.,
Respondent.

MR. PRESIDING JUDGE OF THE CIRCUIT COURT OF THE
SOUTHERN DISTRICT OF NEW YORK.

The respondent, William Harris, Jr., filed a petition for rehearing in which he alleged that the final judgment against the respondent in this cause is erroneous in that the order of dismissal below having been entered upon the motion of the respondent to dismiss the petition at the end of the petitioner's case, the finding that said motion was properly sustained requires that the cause be remanded for further hearing.

The executor of the deceased's estate having advised that respondent had in her possession the securities involved herein, which it had reason to believe belonged to the decedent at the time of his death, filed a petition for citation against said respondent requiring her to testify her possession and retention of such securities. Upon the filing of the petition for citation in the circuit court respondent's counsel stated that she claimed the securities as a gift from her husband, and when she was called as a witness by petitioner under section 90 of the Civil Practice Act she admitted that her husband did not deliver the securities to her as a gift but that he merely turned them over to her to place in a closet to keep them safe for him. While it is true that it was upon respondent's motion made at the close of petitioner's evidence that the trial court inadvertently entered the

order dismissing the petition for citation, which order we reversed in our original opinion, it is also true that it would serve no useful purpose to remand this cause for further hearing so that respondent might be permitted to present evidence in support of her position that the securities were delivered to her as a gift, since it is impossible to conceive of any evidence that she could present upon a further hearing to show a gift of the securities to her in view of the fact that she herself has already admitted that her husband did not deliver them to her as a gift but merely for safe-keeping for him.

We adhere to our original opinion and remandment order directing respondent "to deliver the notes and interest coupons in question to the executor and in the event that she has collected upon said notes or interest coupons, or any of them, to deliver the proceeds thereof to said executor."

PETITION FOR REHEARING DENIED.

Friend and Scanlan, JJ., concur.

order dismissing the petition for citation, which order we reversed in our original opinion, it is also true that it would serve no useful purpose to remand this case for further hearing so that respondent might be permitted to present evidence in support of her position that the accounts were delivered to her as a gift, since it is impossible to conceive of any evidence that she could present upon a further hearing to show a gift of the securities to her in view of the fact that she herself has already admitted that her husband did not deliver them to her as a gift but merely for safe-keeping for him. We adhere to our original opinion and remandment order directing respondent "to deliver the notes and interest coupons in question to the executor and in the event that she has collected upon said notes or interest coupons, or any of them, to deliver the proceeds thereof to said executor."

PETITION FOR REHEARING DENIED.

Trind and Terman, JJ., concur.

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DR. WILLIAM H. BENSON,

Appellee,

v.

EARL M. WILLIAMS,

Appellant.

APPEAL FROM

CIRCUIT COURT

OF CHICAGO.

MR. JUSTICE LUKE DELIVERED THE OPINION OF THE COURT.

This is an action of forcible entry and detainer for possession of the third floor apartment at 5845 Prairie Avenue, Chicago, Illinois. The cause was tried before the court without a jury, and judgment was entered in favor of plaintiff for possession, from which judgment defendant appeals.

The record discloses that plaintiff as owner of the premises entered into a written lease with one Harold Hoppley for the apartment in question, the term beginning May 1, 1943 and ending April 30, 1944. Defendant and his wife were roomers in the Hoppley apartment. In the month of August, 1943, plaintiff brought forcible entry and detainer proceedings against Hoppley for possession of the premises. Judgment for possession was entered but no writ of restitution was ever taken out or served upon Hoppley. Plaintiff testified that he did not evict Hoppley because "he came to me later and paid up and said he would do better, and I did not put him out." Thereafter, without plaintiff's knowledge, Hoppley moved from the premises. As the monthly rent became due under the Hoppley lease it was brought to plaintiff by defendant or defendant's wife, and plaintiff upon receipt of same would either at the time or shortly thereafter give to defendant receipts, which are in evidence, showing that the payment was made by Harold Hoppley for the premises in question. One of the receipts (Def't Exhibit 1) contained a notation in ink, "Pd. by Earl Williams". The record

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WASHINGTON, D.C.

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TO THE HONORABLE SENATE

AND THE HONORABLE HOUSE OF REPRESENTATIVES

IN SENATE

COMMITTEE ON THE SENATE

REPORT

ON THE

PROCEEDINGS OF THE

COMMITTEE ON THE SENATE

IN SENATE

AND HOUSE OF REPRESENTATIVES

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shows there was never any complaint made by the defendant to plaintiff or plaintiff's agent as to the manner in which those receipts were made out. When defendant or his wife brought to plaintiff the rent as the same fell due, plaintiff made inquiry from time to time with reference to Harold Hoppely and was informed by them that Hoppely had sent them to make the payments for him. And at other times they told plaintiff that Hoppely was temporarily out of the city. The evidence further discloses that on September 14, 1943, the wife of defendant requested in writing, as the agent of Harold Hoppely, certain decorations to be done in the apartment. This request (Plf. Exhibit 3) is signed, "Harold Hoppely, by Mrs. E. Williams". On February 29, 1944, defendant made an application in writing to the agent of plaintiff to rent the apartment in question. This request was declined by plaintiff. On May 2nd, 1944, defendant, without the knowledge of Hoppely, purchased a money order (Def. Exhibit 2) in the name of Hoppely, in the sum of \$57.50. Defendant then sent the same to the agent of plaintiff in Hoppely's name, in payment of the rent for the month of May, 1944, which plaintiff refused to accept, as the tenancy of Hoppely had expired under the terms of the lease on April 30, 1944. However, upon receipt of this money order the agents of plaintiff sent the same to Harold Hoppely in a letter (Plf. Exhibit 5) addressed to Hoppely under date May 5, 1944, at the premises in question. Upon receipt of the money order by Hoppely he advised the plaintiff that he did not send the same and knew nothing about it, and he then informed plaintiff that he had left the apartment after the judgment for possession was entered against him. Thus, for the first time, plaintiff learned that Hoppely had moved from the premises in question. On the trial of the cause it was shown, by plaintiff's Exhibit 4, that the rent account was kept by the agent of plaintiff in the name of Harold Hoppely for the entire period from May 1, 1943 to April 30, 1944. Defendant testified

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that he had lived in the apartment for several months; that after Harold Hopley had been sued for possession of the premises by the plaintiff, he, the defendant, had a conversation with plaintiff wherein he told the plaintiff that he would like to take over the flat, and that plaintiff advised him that he could live in the apartment as long as he continued to pay the rent; that he gave plaintiff the rent due on the apartment; that he had paid the rent from thence until April 30, 1944; that the plaintiff had promised him a lease for the apartment next year. In explaining why he purchased the money order ^(Plf's) (Plaintiff's Exhibit 2) in the name of Hopley and sent the same to the real estate agent, he said that when they (real estate agents) refused to accept the money from him for the payment of the May rent he purchased the money order and sent it to the agents in the name of Harold Hopley. Mrs. Williams, the wife of defendant, testified that she went to court, at the request of Hopley when he was being sued for possession by the plaintiff, and that shortly thereafter Hopley moved from the apartment; that she and her husband had talked with plaintiff about renting the apartment, and that plaintiff said it was all right as long as they paid rent, and that she had paid rent to plaintiff several times and had received the receipts, as hereinabove described, from plaintiff. On rebuttal, plaintiff denied that he ever had a conversation with either Mr. or Mrs. Williams in reference to renting the apartment in question to them, and further denied that he had told defendant Williams that he could occupy the apartment as long as he continued to pay rent; that at the time defendant or his wife gave him the different instalments of rent as the same became due, he thought it was from Harold Hopley, and that Hopley still continued to occupy the apartment, and that he had no reason to suspect that Hopley was not in possession.

 We feel from the evidence in this case that the court was justified in finding that the defendant was not in possession of the premises as a tenant; and that plaintiff recognized Hopley as his

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tenant for the duration of his lease which expired April 30, 1944. The actions of plaintiff and defendant and the surrounding circumstances indicate that defendant did not regard himself as a tenant of plaintiff, as the record shows that all payments of rent were made in the name of Hoppley; that defendant made a request of the plaintiff in writing to rent the premises, which was declined by plaintiff; that at the time the request was made for decorations of the apartment it was made in the name of Harold Hoppley and not in the name of defendant; that the money order was purchased in the name of Harold Hoppley by defendant and sent to plaintiff as a payment of Harold Hoppley for the rent for May, 1944. That plaintiff did not recognize defendant as his tenant, ^{is clearly} shown by the receipts which were given for rent in the name of Harold Hoppley, and were accepted by defendant without comment. Next the record shows that the rent account was kept in the name of Harold Hoppley by plaintiff, and lastly, that the letter returning the money order to Hoppley was addressed to Hoppley at the premises in question.

Because of these salient facts and circumstances, we feel that plaintiff was justified in recognizing Hoppley as his tenant.

Counsel for defendant contends that section 6(a) of Maximum Rent Regulation of Office of Price Administration prohibits an action such as this to evict or recover possession of premises unless the action is for the non-payment of rent or for violation of a substantial obligation of the tenancy, and he argues that no evidence was offered or received that the defendant owed any rent or had violated a substantial obligation of his tenancy; and he further contends in view of the fact that no evidence had been offered or received that the defendant was illegally upon or unlawfully withholding the premises from the plaintiff, plaintiff cannot recover.

Section 6(a) of the Rent Regulation for Housing (published in Federal Register as title 38, ch. 11, No. 1388, sec. 1388.1181,

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S. F. R. 7322) provides, as one of the exceptions to its application, that it shall apply unless:

"4. the tenant's lease has expired and the occupants of the housing accommodations are subtenants or other persons who occupy under a rental agreement with the tenant, and no part of the accommodations is used by the tenant as his own dwelling."

Again the same regulation in section 6(c) provides for exceptions from section 6:

"(1) Subtenant. The provisions of this section do not apply to a subtenant or other person who occupied under a rental agreement with the tenant where removal or eviction of the subtenant or other such occupant is sought by the landlord and of the tenant, unless under the local law there is a tenancy relationship between the landlord and the subtenant or other such occupant."

We are of the opinion that the regulations thereby expressly except subtenants from their provisions. The record indicates that defendant was not a tenant of plaintiff, and therefore the regulation relied upon not only affords no relief to defendant, but in terms exempts him from its operation.

It is It is contended that the judgment is against the weight of the evidence. The trial judge before whom the witnesses appeared was in a better position than we are to determine their credibility and the weight to be given to their testimony. He saw and heard, and had the opportunity to observe their demeanor while testifying. The evidence raised a question as to the matters of fact involved, and as to such issues the determination thereof by the trial court is conclusive unless a reviewing court can say that the trial court's conclusion was manifestly against the weight of the evidence, and we cannot so hold in view of the facts and circumstances as they are presented by the record in this case.

We feel that the finding was warranted, and therefore the judgment is affirmed.

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JUDGMENT AFFIRMED.

BURKE, P. J. AND KILEY, J. CONCUR.

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1. Landlord and Tenant, \$11*-- where evidence warrants finding that lessee remains tenant, even though rent is paid by another occupant.

In forcible entry and detainer action by landlord to recover possession of premises from occupant who had been paying rent on behalf of lessee, evidence justified finding that landlord never had recognized defendant as tenant, but had continued to regard lessee as tenant, even though latter had moved from premises without lessor's knowledge.

2. Forcible Entry and Detainer, \$25*-- prohibitions of Rent Regulations of Office of Price Administration not applicable as against subtenants.

Section 6(a) of Maximum Rent Regulation of Office of Price Administration, prohibiting action to recover possession of premises from tenant unless action is for nonpayment of rent or violation of substantial obligation of tenancy, does not apply in favor of subtenant or other person occupying under rental agreement with tenant, unless under local law there is tenancy relationship between landlord and subtenant or such other occupant.

3. Appeal and Error, \$1710*-- when trial court's findings conclusive.

Trial court's determination of facts is conclusive unless reviewing court can say that trial court's conclusion is manifestly against weight of evidence.

DeVine 10x23

by defendant

Error to the Municipal Court of Chicago;
~~Superior Court of Cook county;~~

Appeal from the Circuit Court of county;
County Court of county;

the Hon. Charles Dougherty, Judge, presiding. Heard

in the third division of

this court for the first district at the October term, 1944.

Affirmed
Reversed Judgment affirmed.

Reversed and remanded with directions.

Opinion filed January 26, 1945. Rehearing denied

11 DeVine 12x23

Howard D. Geter, of Chicago,

for appellants.

for plaintiffs in error.

Sonnenschein, Berkson, Lautmann, Levinson & Morse, of Chicago,

for appellees.

Isaac E. Ferguson and Ben Liss, both of Chicago, of counsel.

for defendants in error.

MR. PRESIDING JUSTICE Lupe

delivered the opinion of the court

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CARL GORANSON,
Appellant,

v.

YELLOW CAB COMPANY,
a corporation,
Appellee.

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)
) APPEAL FROM CIRCUIT
) COURT, COOK COUNTY. 32
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MR. PRESIDING JUSTICE SULLIVAN DELIVERED OPINION OF THE COURT.

This action was brought by plaintiff, Carl Goranson, against the Yellow Cab Company, Raymond Bradley and Chicago Surface Lines to recover damages for personal injuries alleged to have been caused by the negligence of defendants. Goranson was riding as a passenger in a yellow cab which was involved in a collision with an automobile owned and operated by Bradley. As the result of such collision the cab struck a street car belonging to the Chicago Surface Lines. The trial court directed the jury to return a verdict of not guilty as to the Chicago Surface Lines. The jury returned a verdict of guilty as to the Yellow Cab Company and assessed plaintiff's damages against it at \$4,600 and also returned a verdict of guilty as to Raymond Bradley and assessed plaintiff's damages against him at \$400. Judgments were entered on the three verdicts but on plaintiff's motion the judgment against Bradley was vacated and the cause dismissed as to him. The trial court directed that, unless plaintiff remitted \$2,100 from his \$4,600 judgment against the Yellow Cab Company within 5 days, a new trial would be allowed as to it. Plaintiff refused to consent to the remittitur and an order was entered granting the Yellow Cab Company a new trial. Plaintiff filed a petition for leave to appeal from said order, which we have heretofore allowed.

The trial judge stated his reasons for entering the order of remittitur as follows:

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APPEAL FROM CIRCUIT
COURT, COOK COUNTY,

CARL GORANSON,
Appellant,
v.
YELLOW CAB COMPANY,
a corporation,
Appellee.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED OPINION OF THE COURT.

This action was brought by plaintiff, Carl Goranson, against the Yellow Cab Company, Raymond Bradley and Chicago Surface Lines to recover damages for personal injuries alleged to have been caused by the negligence of defendants. Goranson was riding as a passenger in a yellow cab which was involved in a collision with an automobile owned and operated by Bradley. As the result of such collision the cab struck a street car belonging to the Chicago Surface Lines. The trial court directed the jury to return a verdict of not guilty as to the Chicago Surface Lines. The jury returned a verdict of guilty as to the Yellow Cab Company and assessed plaintiff's damages against it at \$4,800 and also returned a verdict of guilty as to Raymond Bradley and assessed plaintiff's damages against him at \$400. Judgments were entered on the three verdicts but on plaintiff's motion the judgment against Bradley was vacated and the cause dismissed as to him. The trial court directed that, unless plaintiff remitted \$2,100 from his \$4,800 judgment against the Yellow Cab Company within 5 days, a new trial would be allowed as to it. Plaintiff refused to consent to the remittitur and an order was entered granting the Yellow Cab Company a new trial. Plaintiff filed a petition for leave to appeal from said order, which we have heretofore allowed.

The trial judge stated his reasons for entering the

"The essence of it was that the Court was convinced from this record that the plaintiff, throughout the period of time, through most of the period of time that he claimed he was unable to work, that he was physically capable of work, did not want to work, was a loafer. He had been offered an opportunity to work, even at the old place where he had been working. That so far as his claim of inability to work during the period in question, in order to build up a claim for damages for loss of earnings, that in that respect, he was malingering."

The only question presented is whether the order granting the Yellow Cab Company a new trial was entered by the trial court in the exercise of its sound discretion or whether said order was entered arbitrarily and in abuse of its discretion. However, in determining this question it will be necessary to consider whether the trial judge properly exercised his discretion in entering the order of remittitur or whether that order was arbitrarily entered. The Yellow Cab Company (hereinafter referred to as the defendant) concedes in its brief that plaintiff has "a legitimate claim for some damages" and since the reason advanced by the trial judge for the order of remittitur was that he was convinced from the record that plaintiff was able to work for a considerable period of time that he claimed he was unable to work and that he was "malingering," the only evidence that need be considered is that relating to plaintiff's injuries and damages. The period of time apparently referred to by the trial judge during which in his opinion plaintiff was malingering was the 26 weeks immediately preceding the trial and it was for the damages ostensibly allowed by the jury for his loss of earnings for this 26 weeks, at the rate of \$81 a week, that plaintiff was ordered to remit \$2,100.

Inasmuch as defendant states in its answer to plaintiff's petition for leave to appeal that the abstract "sufficiently

"The essence of it was that the court was convinced from this record that the plaintiff, throughout the period of time, through most of the period of time that he claimed he was unable to work, that he was physically unable to work, and not to work, was a loser. He had been offered an opportunity to work, even at the old place where he had been working. That so far as his claim of inability to work during the period in question, in order to build up a claim for loss of earnings, that in that respect, he was not entitled."

The only question presented is whether the order granting the Yellow Cab Company a new trial and entered by the trial court in the exercise of its sound discretion on October 14, 1934, was entered arbitrarily and in abuse of its discretion. Now, even in determining this question it will be necessary to consider whether the trial judge properly exercised his discretion in entering the order of retrial or whether that order was arbitrarily entered. The Yellow Cab Company (defendant) referred to as the defendant, appeared in its first trial which still was "a legal claim for damages" and since the reason advanced by the trial judge for the order of retrial was that he was convinced from the record that plaintiff was able to work for a considerable period of time that he claimed he was unable to work and that he was "a loser," the only evidence that need be considered is that relating to plaintiff's injuries and damages. The period of time apparently referred to by the trial judge in his opinion plaintiff was maintaining was the 26 weeks immediately preceding the trial and it was for the damages essentially allowed by the jury for his loss of earnings for this 26 weeks, at the rate of \$61 a week, that plaintiff was ordered to remit \$2,100.

Inasmuch as defendant states in its answer to plaintiff's petition for leave to appeal that the abstract "arbitrarily"

states the material facts" we quote therefrom the testimony of plaintiff and his attending physician, Dr. James F. DePree.

Dr. DePree testified as follows on his direct examination:

"I know Carl Goranson the plaintiff *** and first saw him on the morning of January 25, 1943, at the Wesley Memorial Hospital and made an examination at that time. I was notified upon arrival at the hospital that morning by our resident doctor, that this patient had been admitted during the morning and I saw him during the course of my round making. Did a body examination of him, including a review of the x-rays and I found that he was conscious at that time. I don't remember what time in the morning; it was during the morning hours. The first thing that struck me was the bleeding from the left ear. There was a small laceration behind the left ear, a laceration in the scalp on the left side behind the ear. There was considerable swelling and discoloration of the soft parts behind the left ear. There was also swelling and discoloration about the left shoulder on the top of the left shoulder, that portion that lies between the shoulder and the neck on the left side. He complained of pain in his back between his shoulder blades, and upon examination there, I found extreme tenderness on the left side of the back and in the chest on the left side. The patient's general condition, I would say, was good. He was not in shock as laboratory findings were normal. The blood pressure was normal, his pulse, I recall, was a trifle over normal. The x-rays were seen and we found a fracture of the left clavicle, a transverse fracture of the left clavicle, a simple fracture with some fragmentation, which we call comminuted, which means that it is broken into several small pieces. And by simple fracture is meant it didn't puncture through the skin. There were also fractures of the eighth and

states the material facts we quote therefrom the testimony of plaintiff and his attending physician, Dr. James T. Davies. Dr. Davies testified as follows on his direct examination:

Ques:

"I know Carl because the plaintiff and I saw him on the morning of January 25, 1934, at the Wesley Memorial Hospital and made an examination at that time. I was notified upon arrival at the hospital that morning by our resident doctor, that this patient had been admitted during the morning and I saw him during the course of my rounds that day. This a body examination of him, including a review of the x-rays and I found that he was conscious at that time. I don't remember what time in the morning; it was during the morning hours. The first thing that struck me was the bleeding from the left ear. There was a small laceration behind the left ear, a laceration in the scalp on the left side behind the ear. There was considerable swelling and discoloration of the left side behind the left ear. There was also swelling and discoloration about the left shoulder on the top of the left shoulder, that portion that lies between the shoulder and the neck on the left side. He complained of pain in his back between his shoulder blades, and upon examination there, I found extreme tenderness on the left side of the back and in the chest on the left side. The patient's general condition, I would say, was good. He was not in shock as laboratory findings were normal. The blood pressure was normal, his pulse, I recall, was a trifle over normal. The x-rays were seen and we found a fracture of the left clavicle, a transverse fracture of the left clavicle, a simple fracture with some fragmentation, which we call comminuted, which means that it is broken into several small pieces. And by simple fracture is meant it didn't puncture through the skin. There were also fractures of the eighth and

ninth ribs on the left side, which were oblique fractures, simple fractures, at approximately the site of the attachment to the spine, meaning at the center of the back. X-ray films of the skull did not show any evidence of a fracture which was visualized in the x-ray films. ***

"Bleeding from an ear where there has been an injury, usually signifies that the membrane or the ear drum has been perforated to allow blood to escape from the inner portions of the ear.

"It usually makes us suspect that there has been an injury to the head along with the findings that actual trauma did exist and laceration, swelling, and discoloration. ***

"This patient was placed in bed and there are many ways of treating a fracture of the clavicle. Had it not been for the seriousness of his other injury, we could have chosen to allow him to be up and about with a splint, but inasmuch as the immediate injury necessitated remaining in bed - these fractures heal satisfactorily with a person in a recumbent position; and, we therefore kept him flat on his back allowing his left shoulder to remain immobilized on the bed. A binder, I believe, was applied to his - as I recall, a binder was applied to his chest, and a splint to the ribs, to give him comfort. Sedatives were given for his pain. The patient was kept in bed for a period of about one month.

"During that month, I think I saw him about every day the bleeding from the ear continued, through about the first week that he was there, there was some bleeding from the ear at intervals, not all the time, not steady. And his shoulder improved during that month and after that he was allowed to stay up and finally left the hospital. The exact date is February 23, 1943. He called on me at the office I have at the hospital a total of about six times. I saw him throughout

the month of - I saw him in March and I saw him in April and I saw him last on May 5, 1943.

"Each time the patient saw me he complained of the pain and the tight sensation back of his ear. He made no complaint of the use of the shoulder, but did tell me each time, about the numbness of the left little and ring fingers. He still was complaining about those things the last time I saw him.

"There was no treatment for the numbness of the left hand in the way of active treatment. We gave him advice as to the active and passive motion of his arm, and suggested that he use baths, hot water. Suggested in the latter phases that he alternate the hot and cold water baths.

"Q. Have you an opinion, doctor, based upon a reasonable medical certainty, as to whether or not the injury of Mr. Goranson that you saw and treated him for could or might have been brought about and caused numbness in the left hand? A. Yes, I do. There are, of course, several things that could cause such a numbness, but this man had an injury to the region of his head, to the left neck. We know that the brain is the center of all the nervous impulses, motor and sensory, and that the brachial plexus passes out through the neck into the region of the conduits on each side; and it is reasonable to suppose, because of the distribution - it is our opinion that there had been an injury to the nerve trunks that served the left upper extremity, and with the distribution of the sensory disturbance it corresponded to the ulnar nerve.

"Q. Will you tell the jury whether or not you found in Mr. Goranson any indication of an injury to the brain or any evidence of an injury? A. Yes, we saw Mr. Goranson over a period of from January 25, 1943 to May 6, 1943. When we first saw him he had evidences of a blow to the head. He had bleeding

the month of - I saw him in March and I saw him in April and I saw him last on May 2, 1943.

"Each time the patient saw me he complained of the pain and the slight numbness back of his ear. He made no complaint of the use of the shoulder, but did tell me each time, about the numbness of the left little and ring fingers. He still was complaining about these things the last time I saw him.

"There was no treatment for the numbness of the left hand in the way of active treatment. He gave him advice as to the active and passive motion of his arm, and suggested that he use baths, hot water. Suggested in the latter phases that he alternate the hot and cold water baths.

"6. Have you an opinion, doctor, based upon a reasonable

medical certainty, as to whether or not the injury of Mr. Goranson that you saw and treated him for could or might have been brought about and caused numbness in the left hand? A.

Yes, I do. There are, of course, several things that could

cause such a numbness, but this man had an injury to the region of his head, to the left neck. We know that the brain is the center of all the nervous impulses, motor and sensory, and that the brachial plexus passes out from the neck into the region of the axilla on each side; and it is reasonable

to suppose, because of the distribution - it is our opinion that there had been an injury to the nerve trunks that served the left upper extremity, and with the distribution of the

sensory disturbance it corresponded to the ulnar nerve.

"6. Will you tell the jury whether or not you found in

Mr. Goranson any indication of an injury to the brain or any

evidence of an injury? A. Yes, we saw Mr. Goranson over a

period of from January 22, 1943 to May 6, 1943. When we first saw him he had evidences of a blow to the head. He had bleeding

from his left ear, and he complained then of pain, which overshadowed any other complaints. As he gradually improved and the pain disappeared, he continued to complain of numbness.

"It is our opinion, therefore, that because there was a history that he had been unconscious right after this injury; that upon arriving at the hospital he was somewhat dazed, not unconscious, but dazed; and that during the subsequent visits he made to see me there was numbness of the left little and ring fingers, indicating a sensory disturbance - meaning sensation disturbance, that there is not a motor disturbance - by that I mean a function of the fingers - he could move his fingers, he could move his shoulder, indicating that the nerve trunks in the neck were not injured because if the nerve trunks in the neck had been injured, there would be both sensory and motor disturbance.

"These findings indicated to me, and it became my opinion, that this man had had a concussion of the brain, known as cerebral concussion.

"Q. Doctor, have you an opinion based upon reasonable medical certainty as to whether or not the condition Mr. Goranson complains of is or is not permanent? A. To answer you I would say that I would not, from a medical standpoint, be reasonably able to say whether or not that condition is permanent. In other words, only time can tell."

He testified on cross-examination as follows:

"I was the doctor that saw Mr. Goranson most of the time. I think Dr. Metz saw him a couple of times and Dr. Householder. I was not present when any other doctor treated him that I recall. So far as I know Dr. Metz, other than seeing him there at the hospital, never gave him any treatment nor did Dr. Householder give him any treatment, except visits on rounds while he was in the hospital. I don't recall if Dr. Householder saw him

from his left ear, and he complained of pain, which ever-
shadowed any other complaints. As he gradually improved and
the pain disappeared, he continued to complain of weakness.
"It is one of those things," he said, "which I have never
a history that he had been unconscious at that time and
that upon arriving at the hospital he was somewhat dazed, not
unconscious, but dazed; he was unable to understand what
he made to see or hear. He was unable to see his little and
ring fingers, including the middle finger - meaning that
action distance, that there is not a motor distance -
by that I mean a sensation of the fingers - he could move his
fingers, he could move his arm, but he could not move his
fingers in the neck and he could not move his arm in the neck
in the neck had been injured, there would be no recovery and
motor distance.

"These findings indicated to me, and it became my opinion,
that this man had had a sensation of the fingers, known as cere-
bral sensation.
"The doctor, having an opinion based upon reasonable
medical certainty as to whether or not the sensation Mr. Gorman
complains of is or is not permanent. To answer you I would
say that I would not, from a medical standpoint, be reasonably
able to say whether or not that condition is permanent, in
other words, only time can tell."

He testified on cross-examination as follows:
"I was the doctor that saw Mr. Gorman most of the time.
I think Dr. Wetz saw him a couple of times and Dr. Henschel.
I was not present when any other doctor treated him that I
recall. So far as I know Dr. Wetz, other than seeing him there
at the hospital, never gave him any treatment nor did Dr. Hensch-
holder give him any treatment, except visits on rounds while he
was in the hospital. I don't recall if Dr. Henschholder saw him

after he was dismissed from the hospital. I kept a record of the number of times Mr. Goranson called after he left the hospital. I have the dates if you want them, March 4th, 18th, April 6th, 8th, 9th, 22nd and May 6th. A total of seven visits. On two or three of those occasions I cleaned out his ear and removed the dried up clots of blood and May 6th was the last date I saw him. I didn't discharge him on that date. I told him to report to me again if any unusual findings developed. While he was in the hospital he was up and around for more than a week before he left there. I don't recall the exact date. My records show that February 16, 1943 he was up in a chair for a short time, and on the 18th he was up and about the room.

"You cannot see numbness, this is a subjective complaint. The motor function of the arm has recovered, that is, he can use it for any movement. It was not until about the middle of April that my notes indicate that his function, motor function, was normal and he had full use as far as movement is concerned. It has never been paralyzed. *** There was no shock at all, as we ordinarily measure shock. In a case of head injuries, we often see head injuries where no shock occurs in the sense that we refer to it, that is, requiring plasma or stimulants. We speak of shock as that state in which the person's blood pressure drops way down, and we expect the patient is going to die unless we do something about it. When I made that statement awhile ago, I meant that the patient's condition was good, and he wasn't in shock; and we didn't have to administer stimulants to keep him alive. When a patient has a brain injury we do use some stimulants. The blood pressure at the time I examined him first that morning was normal. *** It was less than it was on admission, but I didn't take the admission blood pressure. *** His pulse was slightly increased. I think it was around 100 or 108, and his temperature was 99.2, a half a degree over normal.

"The laceration in back of his ear cleared up in a few days. There was a swelling and discoloration that persisted for about three weeks. On February 5th, I have a notation that there was still very much discoloration about the left side of the head and neck. There was no objective finding about his left arm, and by objective we mean that which we can see or feel. The left arm was not atrophied.

"Q. And it is possible, doctor, that the plaintiff in this case may be malingering? A. No, I don't think so.

"Q. That is, you base that on what he says, is that right, doctor? A. I base that on - yes, I would have to, because after all it is a patient and doctor relationship.

"I haven't examined him since May, 1943, but at that time I recall that I advised him gradually to become more and more active, see what he could do or attempt to do next.

"As to whether he could do a normal day's work for a person of his age, it would depend on the type of work that certain individual would have to do. I believe there was some conversation between us regarding the nature of his work, and he said it was necessary for him to get up on scaffoldings and overhead platforms; and I cautioned him against doing that as long as he continued to have some dizzy feeling as a result. Dizziness is a subjective complaint. As to what work he was doing at that time, he told me that if he went back to doing the same thing he was doing, it would be in the way of supervising and he would have to do some climbing and inspecting of the machines as they were being run. He told me he worked for the Tropic Aire, I drive past their place every day. He told me that his work was supervisory at that factory. I didn't go into any further details. ***

"The ribs were immobilized in the treatment, we customarily apply a binder, it is known as a Scultetus binder or many-tailed

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As that prior writing was dated 11/28/68, the following is provided:

CONFIDENTIAL

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not broken or cracked or any other way that would be dangerous to

the signs and symptoms of a heart attack.

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"The ship was not damaged."

ably a binder, it is known as a self-binding or self-titled

binder or bandage, its purpose is to immobilize him, and keep him from motion. It sort of limits their breathing and produces less pain. He had a good and substantial recovery from the rib condition.

"Q. Did you at any time tell him, doctor, that in May, 1943, that in your opinion it would be six to eight months before he would be able to return to his former occupation? A. I don't know what time I - whether it was six or eight months that I told him. I do know that in a report that we wrote out that I did say it would be perhaps three or four months. My copy of the report says that that was a statement I made and I presume that I told him that same thing."

In reference to his injuries and damages plaintiff testified as follows on direct examination: "I was hurt by the collision, I don't know if I was unconscious at that second, I did not remember just what happened after the collision. First I remember was when I was out in the street. I don't know what part of the street I was in. I think I was sitting on the running board of the cab. I felt bad all over. I had awful pains in my head and my left shoulder and my side was hurting, and my back, and whole upper part of my body felt awfully bad. I remember being in a car and being taken to the hospital, I have some recollection that someone took me to the hospital, to the Wesley Memorial Hospital. I know I woke up in bed the next day and I recall that I was some place in the hospital and people were talking to me. *** When I woke up the next morning I felt worse than I did the night before. My left shoulder felt bad, and when lying in bed my back was hurting me, and my head ached, and my left side, all over my left side, and blood was draining out of my ear. *** Coming out of the entrance of my left ear. I believe my ear drained for two or three weeks. I had Dr. Metz, Dr. DePree, and Drs. Householder and Patton. *** Most of the time I was seen by Dr. DePree. He had me lie on my

side for three and one-half weeks. Then he set me up in bed to get my balance. I sat up the next day and sat in a chair for a day and then walked around the hospital for a week after.

"I was in the hospital close to five weeks and was taken home by my brother in an automobile. I continued to call back to the hospital for treatment. The first month I went every other day or so and during that period Dr. DePree took care of me. I went every two weeks or ten days after the first month, and continued to go until June or up to the summertime.

"After I got up and was walking around the hospital, I had a pain behind my ear and after I came back from the hospital I had pain behind my ear, and when I saw Dr. DePree he did something in my ear after that. My collar bone was cracked and was hurting me on the left shoulder blade and it was hurting me at the back of my head. When I turned my head like this (indicating) I got an awful tension, and my two fingers, left little finger and ring finger and the palm of my hand here, is numb, that is, my left hand. My left collar bone is broken and I can feel the break at the present time, the bone where it is broken, it is like a half inch sticking out. It protrudes one-half inch and you can easily feel it with your hand, and I still feel pain in that shoulder bone. Sometimes it is worse, and sometimes it is better. The weather has an effect on it. The change of weather makes an awful pain right in here (indicating), and, as I said before, right in my head. Well, today I feel very good, but yesterday I felt punk. I had a headache and it seemed like it was coming from over my left eye and forehead. Sometimes I have a headache and pain from over my left eye and forehead as often as three or four times a week.

"Before this accident, as to the condition of my head, I have never been sick, never been real sick. I have always been healthy and kept myself healthy. Once in a great while

I would have headaches. I have never had any feelings in my arm like numbness prior to this accident, nor in my hand or shoulder. At the present time I feel pain in these two fingers, the ring finger and the little finger. The best way I can tell it is that the hand goes to sleep and the same thing with these fingers.

"I have tried to do work, since the accident, off and on. I have tried to drive automobiles - I have odd jobs in driving automobiles and I make a few dollars doing that. When driving, if I hold my arm in a certain position, *** part of the whole arm goes to sleep, and I am not sure of myself when I am driving a car. I am not sure about myself so I can't keep it up. If I bend down and come up, - seems like I am dizzy, something like that. My face does not change in color, it is only that marks come in front of my eyes. At the present time I get a pain in my shoulder and my two fingers and the palm of my hand, the same condition in my hand, arm, and fingers as while I was still in the hospital; there hasn't been any change in that condition and my head and neck is pretty close to the same condition that it was. I went back to the hospital and I saw Dr. DeFree for three or four months. At, and just before the day that this accident happened, I was ~~assistant~~ supervisor at the Tropic Aire Inc. It is a defense plant - engaged in war work. I worked for Tropic Aire close to eight months. I started out as a lathe hand and was promoted the 5th of January, last year. I got a promotion to supervisor.

"I am thirty-nine years of age."

Goranson testified on cross-examination as follows:

"I didn't see the doctor, after May 6th, I didn't see the doctor in the months of June, July or August. I didn't go to the hospital in the month of August at all. What I meant by 'lately,' I said up to the summertime.

I would have headaches. I have never had any feelings in my arm like numbness prior to this accident, nor in my hand or shoulder. At the present time I feel pain in these two fingers, the ring finger and the little finger. The best way I can tell it is that the hand goes to sleep and it's coming back with these fingers.

"I have tried to do work, since the accident, off and on. I have tried to drive automobiles - I have only been in driving automobiles and I made a few dollars doing that. When driving if I hold my arm in a certain position, it's all right, but when my arm goes to sleep, and I am not sure of myself when I am driving a car. I am not sure about myself so I don't go it up. If I bend down and come up, - seems like an injury, something like that. My face does not change in color, it is only that marks come in front of my eyes. At the present time I get a pain in my shoulder and my two fingers and the palm of my hand, the same condition in my hand, arm, and fingers as while I was still in the hospital; there hasn't been any change in that condition and my head and neck is pretty close to the same condition that it was. I went back to the hospital and I saw Dr. Gerson for three or four months. At that time before the day that this accident happened, I was assistant supervisor at the Tropic Air Inc. It is a defense plant - engaged in war work. I worked for Tropic Air close to eight months. I started out as a lathe hand and was promoted the 5th of January, last year. I got a promotion to supervisor.

"I am thirty-nine years of age."

Gerson testified on cross-examination as follows:

"I didn't see the doctor, after Ray got hit, I didn't see the doctor in the months of June, July or August. I didn't go to the hospital in the month of August at all. What I meant by 'lately,' I said up to the summertime."

"Q. Did you sign your name and were you sworn by a notary public? *** A. That is right. Q. Did you at any time in this statement say that you had an injury to your left arm involving the ulna nerve? A. The ulna nerve? I don't know exactly what that means. I said the nerve. I had it explained from the doctor. I had heard of the nerve, but, 'ulna' the doctor had to explain to me. There was a nerve back here.

"Since the accident I never went back to the Tropic Aire Company to work *** I have done some driving for the Famous Laundry, 905 North State Street. A hand laundry, and I drove their Oldsmobile, it was not a truck, I have done that off and on. He asked me once in a while to do some delivery for him. He gave me a few dollars. I always made deliveries. I haven't attempted to do any work for anybody else than the Famous Laundry Company. I can move my arm in all directions. *** After this accident I visited the Tropic Aire Company, I talked to the foreman, Mr. James. I think he was the superintendent and I saw him the last time in June or July. The first time I went to see him was a couple of weeks after I got out of the hospital, probably the early part of March. Mr. James told me that my job was waiting for me *** I did not go out there with the intention of going to work there early in March, I went to make a social call *** I had a headache at that time *** I also had a pain in the shoulder. I still have a pain in my shoulder and I had a pain on that day when I made the call. *** Sometimes I got headaches on the job when I was on steady for twelve, fourteen, and sixteen hours. I received treatment from the nurse there *** maybe once or twice I would get a kind of headache, when I went without lunch too long. I only had headaches once in a while *** As to what I spend time on during the day now, I read and I study; I am not going to school. I read about machinery. I am learning about machinery. When I get my general

"I did not know how to get on by a doctor
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 now, I read and I study. I was in the hospital. I was in the
 machinery. I was in the hospital. I was in the

health back, I intend to go back to work. As to when I anticipate that will be, I feel pretty good now."

On redirect examination plaintiff testified as follows:

"Q. Tell us a little more about your work at Tropic Aire Corporation. Do you do any climbing of stairs, lifting, during the time you were supervisor? A. Not any climbing of stairs.

"Q. Do you have to lift something? A. We have a mill machine and lots of girls are working on it and they can't lift the boxes up. I can say that we were working in rolls of steel and that was a little bit too heavy for a lady to lift, so we have to lift boxes up for them.

"Q. That was part of your work there? A. Yes, I was the set up man and I did that.

"Q. Have you tried to do any lifting? A. Yes, I have.

"Q. What effect has it on you? A. It seems like a pulling on my left shoulder.

"Q. Do you feel pain? A. Yes, I do.

"Q. Where do you feel the pain? A. Right in the shoulder. Down where the collarbone is broken.

"Q. Has it any effect on your left side, head or neck? A. A. Tension in my head.

"Q. Do you feel able to going out there now and do the work you did before? A. I don't feel as I did when I was working. I am not feeling perfectly well."

Plaintiff testified on recross-examination as follows:

"I always felt well before and I like to feel well when I go to work.

"Q. On the mornings you don't feel perfectly well, do you always stay at home from work? A. That is the only habit I have - When I go to work, I go to work. Some days I feel

health back, I intend to go back to work. As to when I

anticipate that will be, I feel pretty good now."

On redirect examination Plaintiff testified as

follows:

"Q. Tell us a little more about your work at Tropic Air Corporation. Do you do any climbing of stairs, lifting, during the time you were supervisory? A. Not any climbing of stairs.

"Q. Do you have to lift something? A. We have a mill machine and lots of girls are working on it and they can't lift the boxes up. I can say that we were working in wells of steel and that was a little bit too heavy for a lady to lift, so we have to lift boxes up for them.

"Q. That was part of your work there? A. Yes, I was the set up man and I did that.

"Q. Have you tried to lay lifting? A. Yes, I have.

"Q. What effect has it on you? A. It seems like a

pulling on my left shoulder.

"Q. Do you feel pain? A. Yes, I do.

"Q. Where do you feel the pain? A. Right in the

shoulder. Down where the collarbone is broken.

"Q. Has it any effect on your left side, head or neck?

A. Tension in my head.

"Q. Do you feel able to going out there now and do the

work you did before? A. I don't feel as I did when I was work-

ing. I am not feeling perfectly well."

Plaintiff testified on recross-examination as follows:

"I always felt well before and I like to feel well when

I go to work.

"Q. On the mornings you don't feel perfectly well, do you always stay at home from work? A. That is the only habit I have - When I go to work, I go to work. Some days I feel

good and the next day I don't feel so good. On the days that I don't feel very good I get up at 7:00, 7:30 or 8:00 o'clock. Some days I feel perfectly well. I like to know I am perfectly well when I go to work. I like to know that my head and shoulder is perfectly well before I work. I operate a lathe over there. Operating lathes requires lifting. I do lifting when I operate lathes. I lift pieces. These pieces are small but when they get in a box, I would say the weight is 250 to 300 pounds."

It is undisputed that plaintiff's loss of pay from January 25, 1943, the date of his accident, until the time of the trial was approximately \$3,500, that his hospital bill, including x-rays, was approximately \$200 and that his bill for medical services was \$75. Thus his total out of pocket loss alone amounted to approximately \$3,775. This left about \$825 out of his \$4,600 verdict to compensate him for his pain, suffering and disability, which compensation certainly was neither unreasonable nor excessive.

Defendant presented no medical testimony or evidence of any kind to controvert plaintiff's evidence as to the nature and extent of his injuries or his inability to work up to the time of the trial as a result thereof. Therefore, the trial court's order granting defendant a new trial because of plaintiff's refusal to consent to the remittitur, could only have been warranted if plaintiff's evidence did not sustain the jury's award of damages to him to the extent of the amount of damages ordered remitted.

Inasmuch as we have set forth at length the testimony of plaintiff and his attending physician as to the nature and extent of his injuries and the damages he suffered as the result thereof, we do not deem it necessary to analyze or discuss their testimony in detail.

We are mindful of the rule that it is the duty of the

good and the next day I don't feel so good. On the days that I don't feel very good I get up at 7:00, 7:30 or 8:00 o'clock. Some days I feel perfectly well. I like to know I am perfectly well when I go to work. I like to know that my head and shoulder is perfectly well before I work. I operate a lathe over there. Operating lathes requires lifting. I do lifting when I operate lathes. I lift pieces. These pieces are small but when they get in a box, I would say the weight is 70 to 300 pounds."

It is undisputed that Plaintiff's loss of pay from January 22, 1945, the date of his accident, until the time of the trial was approximately \$3,500, that his hospital bill, including x-rays, was approximately \$200 and that his bill for medical services was \$75. That his total out of pocket loss alone amounted to approximately \$3,775. This last amount, \$3,775 out of his \$4,000 verdict to compensate him for his pain, suffering and disability, which compensation certainly was neither unreasonable nor excessive.

Defendant presented no medical testimony or evidence of any kind to controvert Plaintiff's evidence as to the nature and extent of his injuries or his inability to work up to the time of the trial as a result thereof. Therefore, the trial court's order granting defendant a new trial because of Plaintiff's refusal to consent to the verdict, could only have been warranted if Plaintiff's evidence did not sustain the jury's award of damages to him to the extent of the amount of damages ordered remitted.

Inasmuch as we have set forth at length the testimony of Plaintiff and his attending physician as to the nature and extent of his injuries and the damages he suffered as the result thereof, we do not deem it necessary to analyze or discuss their testimony in detail.

We are mindful of the rule that it is the duty of the

trial court to order a new trial where the verdict is against the preponderance of the evidence and of the further rule that in proper cases it is the duty of the trial court to exercise its discretion to cut down excessive verdicts within reasonable limits where such action is warranted, because it can do so with more intelligence than a reviewing court. We are also aware of the rule that where a new trial is granted on the ground of insufficiency of the evidence a stronger case is required to secure a reversal than where it is denied and that the action of the trial court in granting a new trial will not be disturbed unless the evidence palpably supports the verdict. (Callos v. Public Taxi Service, Inc., 292 Ill. App. 399; Village of LaGrange v. Clark, 278 Ill. App. 269.) It is also true that reviewing courts are reluctant to reverse orders granting new trials and seldom do so.

However, in the instant case there was no conflict in the evidence as to the damages sustained by plaintiff. In so far as this appeal is concerned the jury was presented with the simple issue as to whether plaintiff was entitled to recover damages for his loss of earnings for the 26 weeks immediately preceding the trial. There was ample evidence presented to sustain his claim for damages for said 26 weeks, as well as for the other damages awarded him. There is nothing in the record to show that the jury was actuated by passion or prejudice or any other improper motive or that it may have been confused in making its award of damages. The trial was conducted in an orderly manner and was particularly free of any substantial error. Dr. DePree testified that plaintiff was not malingering. Plaintiff's testimony that he was unable to work as a result of his injuries from the date of his accident up to the time of the trial was neither contradicted nor impeached in any manner. There is nothing in the record to show that plaintiff testified falsely and neither is there any inherent

improbability in his testimony that would justify the trial court in disregarding it. The jury had the same opportunity as the trial judge to see and hear the witnesses and of observing their appearance on the witness stand and their manner of testifying. In considering the question as to the amount of damages that should be awarded in a personal injury case it is peculiarly the function of a jury to determine the credibility of the witnesses and the weight, if any, that should be accorded to their testimony, and in our opinion the trial court was not warranted in holding that plaintiff's evidence was insufficient to sustain the award of damages to him for his loss of earnings for the 26 weeks immediately preceding the trial or in disturbing the verdict of the jury as to the damages assessed by it.

We think that the conclusion is inevitable in this case that the trial court did not act in the exercise of its sound discretion but rather that it acted arbitrarily and in abuse of its discretion: (1) in ordering the remittitur and (2) in granting defendant a new trial because of plaintiff's refusal to consent to the remittitur.

The order of the Circuit court of Cook county granting the defendant, Yellow Cab Company, a new trial is reversed and the cause is remanded with directions to enter judgment against said defendant on the verdict of the jury.

ORDER REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

Friend and Scanlan, JJ., concur.

improbability in his testimony that he had been the trial court
in discharging it. The jury, the court said, is the only one
trial judge to see and hear the witnesses and to weigh their
appearances on the stand. It is the jury's duty to decide whether
considering the evidence, the defendant is guilty or not guilty.
be awarded in a personal injury case. The jury is the only one
of a jury to a verdict. The jury is the only one who can
weight, it says, the evidence. The jury is the only one who
in our opinion, the jury is the only one who can decide in this
plaintiff's case. The jury is the only one who can decide in this
damages to be paid for the injury. The jury is the only one who
stays present in the courtroom. The jury is the only one who
jury as to the damages. The jury is the only one who can
the jury is the only one who can decide in this case
that the trial judge is the only one who can decide in this case
discretion and the jury is the only one who can decide in this case
its discretion. (1) In the case of a jury trial, the jury is the
the defendant is the only one who can decide in this case
sent to the jury.

The order of the circuit court of Cook County granting the
defendant, I find, is correct, and the order is reversed and the
cause is remanded with instructions to enter judgment against said
defendant on the verdict of the jury.

WILLIAM H. HARRIS, JR.,
Circuit Court of Cook County.

Friend and Counsel, etc., consent.

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SAMUEL MESIROW,
Appellee,

v.

RAE MESIROW,
Appellant.

)
)
) APPEAL FROM SUPERIOR
) COURT, COOK COUNTY.
)
)

MR. PRESIDING JUSTICE SULLIVAN DELIVERED OPINION OF THE COURT.

This is an interlocutory appeal by defendant, Rae Mesirow, from an order entered by the trial court on May 17, 1944, denying her motion to dissolve a temporary injunction issued January 19, 1944 on the verified petition of plaintiff, Samuel Mesirow.

Plaintiff's complaint, filed February 17, 1943, alleged substantially that he married defendant March 25, 1918 in New Jersey; that they lived together as husband and wife until about October, 1942; that during all of the time he lived with his wife he turned over to her practically all of his earnings and that she "for many years last past has always worked and earned money and has banked the funds sometimes in their joint names and sometimes in hers alone"; that "out of the monies turned over to the defendant for safe keeping by plaintiff they had in excess of *** \$12,000 *** in cash in the First National Bank of Chicago; several shares of the common capital stock of the American Telephone and Telegraph Company; a large savings account with the Bell Savings & Loan Association; several thousand dollars in real estate bonds and considerable amount with the Postal Savings; that part of said funds were withdrawn from the First National Bank of Chicago and other places and invested in United States War Bonds; that the defendant also has other securities and kept them in a safety deposit box"; that he "is not now living with the said defendant due to the incompatibility of the parties and due to the

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defendant's nagging, harassing and generally distasteful attitude towards the plaintiff"; that he "has demanded of the defendant an accounting and division of said monies and securities, which the defendant has denied him"; that "in turning the said monies over to the said defendant, the plaintiff did not, at any time, intend that they were given to the defendant as a gift or advancement"; and that "all of the money and securities were the joint savings of plaintiff and defendant and he is entitled to an accounting thereof and distribution of one-half of the same." The complaint concluded with a prayer for an accounting and an offer to do equity.

Defendant filed her verified answer on March 18, 1943, in which she admitted the marriage, the residence of the parties and that they lived together as husband and wife until October, 1942, and denied that plaintiff turned over to her practically all of his earnings or that she banked any money belonging to him. The answer then alleged in substance that plaintiff from time to time turned over to her only small amounts of money and that "what monies he did turn over to her were considerably insufficient to take care of the care and maintenance that she rendered the plaintiff during the time they were living together"; that "any monies she managed to save, she received as compensation for her services with the Illinois Bell Telephone Company where she has been employed for some 25 years"; that "whatever shares of stock with the American Telephone & Telegraph Company she has were paid for from her own earnings" and that such money as she had in a savings account with the Bell Savings & Loan Association was likewise accumulated from her own earnings; that plaintiff has no interest whatsoever "in any of the funds she managed to save in cash and securities;" that "the parties are not living together is entirely due to the

fault of plaintiff;" that "plaintiff is not entitled to any accounting or division of her monies and securities;" and that whatever amount she has been able to accumulate "has been due to her own earnings for which she has worked hard over a period of many years."

April 27, 1944, defendant filed an amendment to her answer in which she averred that the money plaintiff alleged that he turned over to her was "what purported to be his weekly earnings averaging \$20," which he gave to her for household expenses. At the same time certain other amendments to the answer were filed, which we deem it unnecessary to notice or consider.

After the original answer to the complaint was filed the cause was referred to a master in chancery for hearing and thereafter on October 26, 1943 plaintiff filed a verified petition for the issuance of a writ of ne exeat, which realleged in substance or by reference the allegations of his complaint and contained in addition the following allegations:

"Petitioner shows that the defendant, by her own testimony and admissions before the Master, now has 74 shares of the Bell Savings & Loan Association of the value of \$7400.00; a further account with said Association with a credit balance of \$882.00; approximately \$5,000.00 in United States War Bonds; and 135 shares of American Telephone & Telegraph Co. stock currently valued at approximately \$5,530.00. The defendant further testified that she recently reduced to cash approximately \$4,000.00 worth of so-called Baby Bonds of the United States Government and \$200.00 out of the savings account of the Postal Savings Bank. The records of the Bell Savings and Loan Association introduced in evidence, in addition to the foregoing, show that in the last several months the defendant withdrew from another account in said Bell Savings and Loan Association \$2909.62. The records of the First National Bank of Chicago introduced in evidence also

of the defendant's account, which was shown to the
accounting or division of the bank in question; and that
whatever amount was shown to the bank from the
to her own savings account, which was shown to the bank
of many years.

On July 1, 1934, the defendant's account was shown
in which she had a balance of \$1,000.00. The account
turned over to the bank for the purpose of being
averaging \$80.00. The account was shown to the bank
the same time as the other accounts, and the bank
which we have been discussing, and the bank
after the defendant's account was shown to the bank
of the defendant's account, which was shown to the bank
either on October 1, 1934, or on November 1, 1934.
for the purpose of being shown to the bank in order
to be shown to the bank in order to be shown to the bank
of the defendant's account, which was shown to the bank
contained in Exhibit A, which is a copy of the
testimony shown to the bank, and the bank's own testimony
and admissions before the court, and the bank's own
savings and loan association, which was shown to the bank
account with said association, which was shown to the bank
approximately \$2,000.00 in order to be shown to the bank
of American Telephone & Telegraph Company, which was shown to the bank
approximately \$2,000.00. The defendant's account, which was shown to the bank
she recently refused to cash a check for \$4,000.00 worth of
so-called Baby Bonds of the United States Government and \$200.00
out of the savings account of the Postal Savings Bank. The
records of the Bell Savings and Loan Association introduced in
evidence, in addition to the foregoing, show that in the last
several months the defendant withdrew from another account in
said Bell Savings and Loan Association \$2,000.00. The records
of the First National Bank of Chicago introduced in evidence also

show, in addition to all of the foregoing, that the defendant, since the transferring of an account at the First National Bank from the joint names of the parties hereto to that of the defendant, has withdrawn from said account approximately \$11,000.00; that from all the foregoing it conclusively appears that the defendant has approximately \$35,000.00 of moneys and property in which the plaintiff is a joint owner.

"Petitioner further represents that he is totally without funds of his own and at the present time barely makes a meager living driving a taxicab; that the defendant will not give him any of the funds to which he is entitled and denies his right to any of them; that she has sought to conceal her possession of the foregoing assets so that the plaintiff will be unable to acquire what he is entitled to, and in attempting the concealment thereof, has committed perjury in this cause in that the record disclosed that she sought to hide her possession of these assets and that she surreptitiously acquired a safety vault box at the National Safe Deposit Company in the name of her sister, Zelda Markman, and during the hearing brazenly denied that she had any box of her own but that her sister permitted her to use her vault box. It was only after being confronted with the original signature cards and copy of the contract for the rental of the box that she admitted that she went and applied for the box and signed her sister's name and that only after pretending not to know, after looking at the signature, whether it was her sister's signature or not. The record further disclosed that immediately after the foregoing fact was developed, the defendant ran to the vault and removed her assets to, as she says, a tin box in her home. It further clearly appears from the testimony before the Master that the defendant seeks to hide the existence of these assets in that she testified with reference to the cashing in of approximately \$4,000.00 in United States Government Baby

Bonds and that she 'spent' the money. She refused to explain in detail with reference to the said expenditures and it appears from her cross-examination that she had no unusual expenditures and that her salary from her employment, which has been continuing right along, was quite sufficient for all her needs.

"Petitioner further represents that the defendant has threatened that your petitioner will never get one cent of the funds he is suing for and her conduct in this case has definitely shown that she will secrete said funds so that he will never get possession thereof; that he fears that if a decree adverse to the defendant is entered in this cause, she will immediately depart from this jurisdiction, taking her assets with her, as she has threatened to do, and that plaintiff will be unable to compel compliance with said decree.

"Petitioner further represents that unless the defendant is stayed by a Writ of Ne Exeat Respublica from leaving the jurisdiction of the Court, that all of the plaintiff's rights will be defeated and that justice will be thwarted; that if she is given knowledge of the plaintiff's application for said Writ of Ne Exeat Respublica she will leave this jurisdiction before said writ can be issued and served upon her, to the irreparable injury and damage of the plaintiff.

"Wherefore plaintiff requests and prays that the said defendant may be stayed by a Writ of Ne Exeat Respublica, issued under the seal of this Court, from leaving the jurisdiction herein; and for such other and further relief as the Court shall deem meet."

A writ of ne exeat was ordered to issue for defendant in which her bail was fixed at \$12,500. She was apprehended the following day, October 27, 1943, and brought before Judge Joseph A. Graber on her motion to quash the writ. Upon the hearing on said motion she deliberately and persistently per-

Bonda and that she was to the money. She refused to explain
in detail with reference to the said explanation and its contents
from her cross-examination that she had no unusual circumstances
and that her salary from her employment, which has been con-
tinuing right since, was being withheld for all her time.
"Position: Defendant's position was that the defendant was
threatened that her position will be lost if she does not
leave in a certain time and her position in this case has been
it shown that she will receive a salary of \$100.00 per month
get possession thereof; that is to say that if a person is
to the defendant is not in this case, she will be entitled
to get from the defendant, which is a matter which has
she has threatened to do, and that is to say that she is
compel compliance with such order.
"Position: Defendant's position was that unless the defendant
is stayed by a writ of habeas corpus from leaving the
jurisdiction of the court, that all of the defendant's rights
will be affected and that unless she is stayed, that all
she is given knowledge of the defendant's application for said
writ of habeas corpus, she will leave the jurisdiction
before said writ can be heard and served upon her, to the in-
ferable injury and damage of the plaintiff.
"Wherefore, the plaintiff requests and prays that the said
defendant may be stayed by a writ of habeas corpus,
issued under the seal of this court, from leaving the juris-
diction hereby; and for such of her and further relief as the
Court shall deem best."
A writ of habeas corpus was ordered to issue for defendant
in which her bail was fixed at \$10,000. She was apprehended
the following day, October 27, 1943, and brought before Judge
Joseph A. Graber on her motion to quash the writ. Upon the
hearing on said motion she deliberately and persistently per-

jured herself, denying that she had possession or control of any of the securities or funds mentioned in plaintiff's petition, which she had theretofore admitted before the master that she did have in her possession or control. Her motion to quash the writ was denied and she was ordered committed to the sheriff in default of bail. It appears from the record that on the following morning, October 28, 1943, one Mrs. Minnie Silins, a friend of defendant, appeared in open court before Judge Graber and tendered a sealed envelope containing securities for deposit with the Sheriff of Cook County for the release of the defendant from custody; that these securities belonged to defendant and that she had entrusted them to Mrs. Silins, to be returned when requested; that Mrs. Silins produced them in court pursuant to instructions received by her from defendant the previous evening; and that they were ordered deposited with the sheriff of Cook county where they now remain pending the further order of the court and the defendant, Rae Mesirov, was released from custody. The face value of the securities brought in by Mrs. Silins and deposited with the sheriff for defendant's release was \$12,500.

Plaintiff filed the following verified petition on January 19, 1944:

"That he is the husband of the defendant herein; that he filed his complaint for an accounting in this cause showing that the parties were married in 1918 and since said date both of them continued to work and save their earnings in joint savings accounts, joint bond purchases and any other similar matters, as is more fully shown by the said complaint now on file.

"Petitioner further shows that this cause has been referred to a Master in Chancery of this Court and that proofs have been commenced before said Master in connection with the issues herein and that said proofs disclosed, by the testimony

of the defendant herself, that the parties hereto jointly saved their earnings in various bank accounts and otherwise, until the year 1936; that since that time said accounts were transferred to accounts in the name of the defendant alone and that since 1936 she has had full and exclusive charge of all of said earnings and proceeds thereof and that they have been out of the control of the plaintiff.

"Petitioner further shows that it appears from the evidence already taken in this matter that the defendant considered all of the funds over which she had control as joint funds of the parties hereto until the year 1942 when a separation occurred and thereupon she forfeited plaintiff's rights to said money.

"That heretofore plaintiff caused a petition to be filed in this matter praying for the issuance of a writ of ne exeat respublica against the defendant, Rae Mesirow, in which petition he recited facts and circumstances showing the defendant's attempts to conceal her assets and to put them out of the reach of this Court in order to avoid making proper account to the plaintiff, said petition now on file in this cause, by reference being hereby expressly made a part and parcel of this petition.

"That accordingly a writ of ne exeat was issued as prayed for and the defendant, Rae Mesirow, was taken into the custody of the Sheriff of Cook County, Illinois, having failed to make the bond provided for in the order of the Court; that upon the return of said writ before the Honorable Joseph A. Graber, one of the judges of said Court, the defendant, Rae Mesirow, protested her inability to furnish a bond; that thereupon the Court requested that if she would turn over to the Sheriff of Cook County, pending the outcome of this litigation, the securities in her possession as alleged in the petition for the writ of ne exeat, the Court would release her from the custody

of the Sheriff. The defendant thereupon, in open court, denied that she had any of the said securities; that they had all been previously destroyed or cashed in and the proceeds thereof spent and that she was totally without any of them, whereupon she was remanded to the custody of ^{the} Sheriff and taken to the Cook County Jail.

"That on the morning following said Court appearance, one Mrs. Minnie Silins, a friend of the defendant, Rae Mesirow, appeared in open court before the said Judge Joseph Graber and tendered a sealed envelope containing securities for deposit with the Sheriff of Cook County for the release of the said defendant from custody. The said Minnie Silins testified that she had been entrusted by the defendant, Rae Mesirow, with this envelope of securities to be held for her until such time as its return was requested; that all securities therein were the property of the defendant and that she was only holding it without any knowledge of the reason therefor, awaiting instructions as to its disposition; that on the previous evening she received a telephone call from the defendant, Rae Mesirow, from the Cook County Jail requesting her to bring the envelope and its contents to Court to secure the release of Rae Mesirow from custody; that said envelope contained most of the securities referred to in the plaintiff's petition for the writ of ne exeat and they were deposited with the Sheriff of Cook County where they now remain pending the further order of the Court and the defendant, Rae Mesirow, was released from custody.

"That since said time further hearings in this matter were held before Master in Chancery Frank E. Shudnow and it developed at said hearings and from the investigations that were made based upon the information obtained from said hearings, that the defendant, Rae Mesirow, has secreted large amounts of money and other assets which she has steadfastly denied owning and that

in view of the past conduct of the defendant and her devious manners of attempted concealment thereof, there is grave danger that such other assets will be disposed of. It appears that in less than one year the defendant converted securities and accounts of great value to cash without the knowledge or consent of the plaintiff, that on one day, to-wit: April 26, 1943, she redeemed Eight Thousand (\$8000.00) Dollars face value United States Government Bonds standing in the name of both herself and the plaintiff; that during the early part of 1943 she withdrew in cash the sum of Two Thousand Nine Hundred Fifty-four and 05/100 (\$2954.05) Dollars, from Bell Savings & Loan Association, that during the months of March and April, 1943, she withdrew in cash from the Postal Savings Bank of Chicago the sum of Twenty Five Hundred (\$2500.00) Dollars.

"That at the hearings held in this cause the defendant denies any knowledge of and claims not to remember what she did with any funds received by her as a result of the aforesaid conversions, except as to about Two Thousand (\$2000.00) Dollars which she claims she gave to her mother. She denies having purchased any securities therewith with the exception of Thirty-five Hundred (\$3500.00) Dollars worth of war bonds, and has testified that she now has no more or other war bonds.

"Pursuant to order heretofore entered in this cause, to the effect that the records of the Treasury Department of the United States of America with reference to bond purchases of the parties hereto were necessary for the proper administration of justice, the Treasury Department has furnished to this Court properly authenticated records showing the redemption of the Eight Thousand (\$8000.00) Dollars face value par bonds by the defendant, Rae Mesirow, on April 26, 1943, and showing further that there has been issued to her and is now outstanding and unredeemed, up until the month of June, 1943, in addition to

said Eight Thousand (\$8000.00) Dollars face value bonds, the further amount of Ten Thousand Eight Hundred Twenty-five (\$10,825.00) Dollars face value United States Government bonds.

"Plaintiff charges that from the developments in this case to date it appears that the parties as of July, 1938, had money and securities in the amount of about Twenty-two Thousand (\$22,000.00) Dollars; that since 1936 the defendant, Rae Mesirow, made withdrawals or redemption of securities to an amount in excess of Thirty-five Thousand Five Hundred (\$35,500.00) Dollars and the only new acquisitions of securities by Rae Mesirow during said period are approximately Eight Thousand (\$8,000.00) Dollars; that it appears that the defendant, Rae Mesirow, will be required to account for an accumulation in excess of Fifty Thousand (\$50,000.00) Dollars and that the plaintiff's share thereof will be in excess of Twenty-five Thousand (\$25,000.00) Dollars; that the amount of security for said sum in the hands of the Sheriff of Cook County is grossly inadequate and there is grave danger that the defendant will dispose of the additional assets to put them outside the reach of this Court before the conclusion of this cause.

"It appears from the evidence in this cause that in the year 1924, while the parties had a joint savings account in the Security Bank of Chicago, in which was contained approximately Forty-five Hundred (\$4500.00) Dollars, the defendant, without the knowledge or consent of the plaintiff, withdrew the entire amount and deposited it to her own individual account; that the plaintiff upon discovering the fact sued her in the Circuit Court of Cook County, Illinois, and he obtained an injunction against her, preventing her from disposing of said funds; that said matter was finally settled by the transfer of the entire

10-

and eight hundred (\$800.00) of the same kind, the
further amount of one hundred and twenty-five
(\$125.00) and one hundred and twenty-five
bonds.

"Plaintiff's Exhibit A" is a check for the sum of
one hundred and twenty-five dollars (\$125.00), dated
money and deposited in the name of the defendant,
Thousand (\$1,000.00), which is the balance of
the "action" in which the plaintiff is entitled to
an amount in excess of one hundred and twenty-five
(\$125.00) bonds and the only one of which is
ties by the action being a check for one hundred and
Thousand (\$1,000.00) bonds; and that the plaintiff
and, also, the defendant, are entitled to the same
tion in excess of one hundred and twenty-five
the plaintiff, who is a resident of the State of
Thousand (\$1,000.00) bonds; and that the amount of
said sum in the hands of the defendant is to be paid
inadequate and that it is the duty of the plaintiff
dispose of the additional bonds to the same extent as the
of this Court before the rendition of this order.

"It appears from the evidence in this case that in the
year 1924, while the parties had a joint savings account in the
Security Bank of Chicago, in which account the plaintiff
forty-five hundred (\$450.00) bonds, the defendant, without
the knowledge or consent of the plaintiff, withdrew the entire
amount and deposited it to her own individual account; that
the plaintiff upon discovering the fact and her in the plaintiff
Court of Cook County, Illinois, and he obtained an injunction
against her, preventing her from disposing of said bonds; that
said matter was finally settled by the transfer of the entire

fund back to a joint account of the parties, subject to withdrawal, however, only upon the signatures of both parties thereto.

"The evidence in this matter shows that the defendant has on deposit with the Bell Savings & Loan Association, in addition to the certificates in the hands of the Sheriff, approximately Eight Hundred Eighty-two (\$882.00) Dollars and that she still has a safety vault box in the National Safe Deposit Company in the name of her sister, Zelda Markman, and that unless she is enjoined and restrained by this Honorable Court from withdrawing any amounts from said Bell Savings & Loan Association, or from any other bank, and from access to said safety deposit box, or any other safety boxes, and from redeeming any of the United States Government bonds now in her possession, or from transferring them or otherwise disposing of them, or any other assets, said assets will not be available upon the disposition of the cause; that the said Bell Savings & Loan Association and National Safe Deposit Company should be enjoined from permitting Rae Mesirow the withdrawal of said funds or access to said safe deposit box, or any safe deposit box in any name; that said injunction should issue without notice for the reason that if notice were given of the application for this injunction that the defendant, Rae Mesirow, would accomplish said disposition before the injunction could be made effective and the rights of your petitioner would be irreparably injured.

"Wherefore petitioner prays that another writ of ne exeat issue against the defendant and petitioner prays that the People's Writ of Injunction issue herein against Rae Mesirow, Bell Savings & Loan Association and the National Safe Deposit Company, restraining and enjoining them as follows:

"Enjoining and restraining Rae Mesirow from in any manner withdrawing any of the funds now on deposit in the Bell Savings & Loan Association and from removing any articles from the safe

found back to a point, coming in, and to which
drawal, however, and the fact that the
the even, and in the case of the
on deposit with the bank, and in addition
to the credit of the bank, and in addition
Eight hundred dollars, and in addition
has a history which is not to be confused with
the name of the bank, and in addition
enjoined and restraining the bank from
any and all deposits from the bank, and in
from any other bank, and in addition
box, or any other box, and in addition
United States, or any other State, or from
transferring them or either of them, or from
assets, and in addition, and in addition
of the cause, that the bank, and in addition
National, also deposits, and in addition
has taken the deposit of the bank, and in addition
deposit box, or any other box, and in addition
junction should have been made, and in addition
notice were given of the deposit, and in addition
the defendant, the bank, and in addition
before the injunction could be granted, and in addition
of your petition, and in addition, and in addition
"Therefore petitioners pray that a writ of re-
issue against the defendant and restraining him from
Writ of injunction shall herein be granted, and in addition
& loan Association and the National Bank, and in addition
staying and enjoining them as follows:
"Enjoining and restraining the bank from in any manner
withdrawing any of the funds now on deposit in the Bell Savings
& loan Association and from removing any articles from the safe

deposit box in the National Safe Deposit Company in the name of her sister, Zelda Markman, or from any other safe deposit box in said Company or elsewhere, under her name or any other name, and from in any manner redeeming or disposing of any of the United States bonds or other securities now in her possession or under her control.

"Enjoining and restraining Bell Savings & Loan Association from permitting withdrawal from the account of Rae Mesirow of any funds.

"Enjoining and restraining National Safe Deposit Company from in any manner permitting Rae Mesirow to have access to the safe deposit box in the name of Zelda Markman or to any other safe deposit box in its company under the name of Rae Mesirow or any other name.

"All until the further order of the Court.

"Your petitioner further prays that, for good cause shown, said injunction issue without notice."

The trial court ordered the injunction to issue against defendant as prayed for without notice and "upon plaintiff giving bond in the sum of Five Hundred Dollars and it appearing to the Court that said bond has been presented with the plaintiff as principal and Benjamin H. Ehrlich as surety, the said bond is hereby approved."

In response to plaintiff's petition the trial court also ordered another writ of ne exeat to issue against defendant and she was released from custody on this writ on January 20, 1944 by depositing war bonds in the amount of \$9,800 with the sheriff subject to the further order of the court.

It should be stated at this point that we are not called upon on this appeal to pass upon the propriety of the issuance of the writs of ne exeat. However, the petition for the first writ of ne exeat is incorporated by reference in the petition for the

-12-

deposit box in the National Bank of the City of New York in the name of her sister, Elizabeth, or that it was deposited in any other box in said bank or elsewhere, and that in any event none of any of the United States bonds or other securities listed in the possession of any person or persons.

Nothing and nothing in the above recited petition or the return thereon is to be construed as a denial of the existence of any funds.

Nothing and nothing in the above recited petition or the return thereon is to be construed as a denial of the existence of any funds or of any other assets or interests of any person or persons, or of any other assets or interests of any person or persons, or of any other assets or interests of any person or persons.

"All until the time of order of the court."
"Upon petition" "Whereupon" "for the return of the court."

The trial judge ordered the return of the court against the defendant as prayed for without notice and in default of the bond in the sum of five hundred dollars and is appearing to the Court that said bond has been received from the plaintiff as principal and defendant as surety, the said bond is hereby approved."

In response to plaintiff's petition the trial court also ordered another writ of habeas corpus to issue against defendant and she was released from custody on this writ on January 20, 1944 by depositing war bonds in the amount of \$300 with the sheriff subject to the further order of the court.

It should be stated at this point that we are not called upon on this appeal to pass upon the propriety of the issuance of the writs of habeas corpus. However, the petition for the writ of habeas corpus is incorporated by reference in the petition for the

injunction and the allegations thereof are material and important as affecting plaintiff's right to have the injunction issue and particularly without notice.

On May 1, 1944 defendant filed a written motion to dissolve the injunction order issued January 19, 1944 and asserted as grounds for said motion that "the Court erred in issuing said injunction order without notice, and in not specifying a time for filing complainant's bond" and that "no proper injunction bond was filed in that the bond did not contain a penalty, was not dated and that the surety was the attorney for plaintiff and did not contain a schedule of his assets."

As heretofore shown, it was from the trial court's order denying her motion to dissolve the temporary injunction that defendant appeals.

Plaintiff's first contention is that "the complaint and the petition subsequently filed January 19, 1944, for the issuance of an injunction contained no allegations indicating that the plaintiff would probably be irreparably injured if the temporary injunction did not issue." Since defendant's motion to dissolve did not question the propriety of the issuance of the injunction but rather its issuance without notice, this contention need not be considered but, inasmuch as this point has been stressed in defendant's brief, we deem it expedient to discuss it.

The primary requisite to the issuance of a temporary injunction is stated as follows in 1 High, Injunctions, p. 50: "An injunction being a harsh remedy, will not be granted in the first instance except on a clear prima facie case and upon positive averments of the equities on which the application for the relief is based." A number of other rules necessary to be considered on the hearing of an application for a preliminary injunction are set forth in Peoples Gas Light & Coke Co. v.

Cook Lumber Terminal Co., 256 Ill. App. 357, cited by defendant, where the court said at p. 370:

"There are well settled rules that a court should exercise caution in issuing a preliminary injunction (32 Corpus Juris, p. 33); that such an injunction will not be issued in a doubtful case, or where its effect will be more than the mere maintenance of the status quo (C. J., p. 36); or where its effect is the granting of all the relief that can be obtained after a final hearing (C. J., p. 21); that the facts upon which a complainant relies for the issuance of a preliminary injunction should be stated in the bill with particularity (C. J., p. 321); that all reasonable inferences arising from the allegations, indicating that complainant might not be entitled to the relief as prayed, should be negatived (C. J., p. 322); and that facts, rather than conclusions or opinions of the pleader, should be stated (C. J., p. 322). In 14 Ruling Case Law, sec. 32, p. 331, it is said: 'It is not enough that a complainant shall allege in his bill that the injury will occur to himself or property, but he must show facts to enable the court to judge if the injury will be of the character stated.'"

In our opinion the injunction was ordered to issue against the defendant herein in strict conformity with all of the rules set forth in the foregoing authorities.

Inasmuch as the facts alleged in the complaint and the petition for the issuance of the injunction have been heretofore fully set forth, we deem it unnecessary to analyze or discuss them. A mere reading of the verified complaint shows that it makes out a prima facie case for final relief. In McDougall Co. v. Woods, 247 Ill. App. 170, the court said at p. 172: "In appeals from interlocutory orders it is not our province to determine the rights of the parties in the subject matter of the litigation, but simply to determine from the averments of the bill whether the party probably is entitled to the relief sought."

It clearly appears from a mere reading of the petition for injunction that the facts alleged therein with particularity warranted injunctive relief and that plaintiff would probably have been irreparably injured if the temporary injunction did not issue. There can be no question from the facts alleged in the petition for injunction, and they were not denied in

the trial court, that defendant is a consummate perjurer. She admitted that she perjured herself before the chancellor and it was demonstrated that she lied under oath before the master. It appears from said petition that she fraudulently concealed and disposed of and attempted to conceal and dispose of assets which are the subject matter of this action and it required summary action by the trial court to keep available until the conclusion of this litigation moneys and securities involved herein. If defendant had not been legally prevented from concealing and disposing of the moneys and securities in question, which she unquestionably intended to do, it would indeed be an empty victory for plaintiff if he should prevail in this action.

Defendant next contends that "the court erred in granting the injunction on the ground of the failure of plaintiff to give notice and erred in refusing to vacate the injunctional order." Since we have held that the injunctional order was properly issued, it necessarily follows that the chancellor did not err in refusing to dissolve it. Section 3 of our Injunctions Act (chap. 69, Ill. Rev. Stat. 1943) provides that no injunction shall be granted without previous notice, "unless it shall appear, from the complaint or affidavit accompanying the same, that the rights of the plaintiff will be unduly prejudiced if the injunction is not issued immediately or without such notice." Under the facts alleged in the verified petition for the issuance of the injunction it clearly appears that if advance notice of the application for the injunction were given defendant the very purpose of the application would in all likelihood have been defeated. The injunction was properly issued without notice, because if notice were given defendant, she might make away with the moneys, securities and other assets to secure and protect which the injunction was

the trial court, that defendant is in a commensurate position. The admitted that she performed herself before the chancellor and it was demonstrated that she did not perform before the master. It appears from said evidence that she fraudulently concealed and disposed of her assets to conceal and dispose of assets which are the subject of this action and it required a very long time for the trial court to keep available until the completion of this litigation money and securities involved her. It appears that she had not been legally prevented from concealing and disposing of the money and securities in question, which she unquestionably intended to do, it would appear to be a very long time for plaintiff if he would prevail in this case.

Defendant must contend that the court erred in granting the injunction on the basis of the failure of plaintiff to give notice and error in failing to vacate the injunction as ordered. Since we have held that the injunctive order was properly issued, it now remains to follow that the chancellor did not err in refusing to dissolve it. Section 2 of our Injunctions Act (chap. 92, Ill. Civ. Stat. 1943) provides that no injunction shall be granted without previous notice, "unless it shall appear from the complaint or affidavit accompanying the same, that the rights of the plaintiff will be unduly prejudiced if the injunction is not issued immediately or without such notice." Under the facts alleged in the verified petition for the issuance of the injunction it clearly appears that it was necessary for the application for the injunction were given defendant the very purpose of the application would in all likelihood have been defeated. The injunction was properly issued without notice, because it notice were given defendant, she might make away with the money, securities and other assets to secure and protect which the injunction was

sought, especially in view of her demonstrated propensity to conceal or dispose of all moneys and securities plaintiff claimed an interest in. The injunction would be of little or no value and plaintiff would be unduly prejudiced, if he had been required to give notice under the circumstances disclosed by the aforesaid petition.

It is urged that "no proper bond was filed by the plaintiff because the amount of penalty thereof was omitted." The order for the issuance of the injunction concluded as follows:

"It Is Further Ordered, for good cause shown, that said injunction issue without notice, and upon plaintiff giving bond in the sum of Five Hundred Dollars and it appearing to the Court that said bond has been presented with the plaintiff as principal and Benjamin H. Ehrlich as surety, the said bond is hereby approved."

Although the chancellor fixed plaintiff's bond at \$500 in the injunctive order and it was stated therein that "said" bond had been "presented" and "approved," plaintiff's counsel inadvertently omitted to insert in the space reserved for the penalty in the bond form the amount thereof. Defendant insists that such omission rendered the bond void. We think defendant's position in this regard is untenable. The chancellor intended to and did fix plaintiff's bond in the sum of \$500 and he certainly believed that the bond was in that amount when he approved it. We think that the omission of the amount of the penalty from the bond did not affect its validity, since said amount was fixed by the same order of court which approved the bond. In any event, when the omission from the bond of the amount of the penalty was called to the attention of the chancellor, he granted leave to plaintiff to amend the bond on its face by inserting said amount, so that there is now of record a valid bond upon which any liability that might arise against the surety on said bond may be enforced.

But defendant urges that "the fact that leave was sub-

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But defendant argues that "the fact that leave was sub-

sequently given to plaintiff to correct the bond by inserting the penalty cannot avail plaintiff. The interlocutory appeal is from the order of May 17, 1944. The motion to dissolve was filed May 1, 1944." In support of this contention she cites Bauer v. Lindgren, 279 Ill. App. 397, wherein we held that an interlocutory appeal from an order of a given date must be determined by the record as it was on that date and that subsequent pleadings or orders cannot be invoked to sustain the order. The order appealed from denying defendant's motion to dissolve the temporary injunction was entered on May 17, 1944 and the order granting leave to plaintiff to amend the bond on its face by inserting the amount of the penalty was entered contemporaneously therewith. Therefore such order granting leave to amend the bond comes within the foregoing rule stated in the Bauer case.

Defendant contends that "the chancellor should have disqualified himself from hearing the motion to dissolve the order granting the injunction." Defendant's motions to dissolve the injunction, to quash the second writ of ne exeat and to quash the first writ of ne exeat upon reconsideration of a prior order denying her motion to quash said first writ of ne exeat were heard at the same time and after the chancellor had commented extensively on her conduct before him in relation to the charges contained in the petition for the injunction, her counsel suggested that the trial judge was "disqualified to hear this matter further" and that he "ought to transfer this case to some other chancellor." In his comments the chancellor merely recalled the flagrant perjury committed by defendant before him on the hearing of her motion to quash the first writ of ne exeat, which perjury was alleged in the petition for injunction. Although it appeared from said petition that Judge Graber had knowledge of defendant's perjury, her motion to dissolve the injunction was presented before him without any protest being made as to his

separately given to plaintiff's counsel and by inserting
the penalty cannot avoid liability. The introductory appeal
is from the order of July 15, 1944. The motion to dissolve was
filed May 1, 1945. In support of this contention she cited
Hawley v. Hawley, 117 Cal. 2d 101, 1943, 35 P.2d 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

hearing same and it was not until after he suggested on the hearing on said motion her prior admitted perjury and other wrongful conduct in concealing and disposing of and attempting to conceal and dispose of money and securities involved herein as reasons why her motion to dissolve the injunction should be denied, that it occurred to defendant's counsel to claim that the trial judge was disqualified to pass upon the motion. Defendant's contention that the knowledge of the chancellor of her admitted perjury before him in a prior related proceeding ^{of} and her other wrongful conduct, the facts concerning which were incorporated in the petition for injunction, disqualified such chancellor from hearing the motion to dissolve is too preposterous to merit serious consideration.

Other purely technical points urged by defendant have been considered but in the view we take of this case we deem it unnecessary to discuss them. To do so would only serve to further lengthen this already long opinion.

For the reasons stated herein the order of the trial court denying defendant's motion to vacate and dissolve the temporary injunction issued against her on January 19, 1944 is affirmed.

ORDER AFFIRMED.

Friend and Scanlan, JJ., concur.

• *Journal of Management Education* 30(1): 10-12

2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028 2029 2030 2031 2032 2033 2034 2035 2036 2037 2038 2039 2040 2041 2042 2043 2044 2045 2046 2047 2048 2049 2050 2051 2052 2053 2054 2055 2056 2057 2058 2059 2060 2061 2062 2063 2064 2065 2066 2067 2068 2069 2070 2071 2072 2073 2074 2075 2076 2077 2078 2079 2080 2081 2082 2083 2084 2085 2086 2087 2088 2089 2090 2091 2092 2093 2094 2095 2096 2097 2098 2099 2100 2101 2102 2103 2104 2105 2106 2107 2108 2109 2110 2111 2112 2113 2114 2115 2116 2117 2118 2119 2120 2121 2122 2123 2124 2125 2126 2127 2128 2129 2130 2131 2132 2133 2134 2135 2136 2137 2138 2139 2140 2141 2142 2143 2144 2145 2146 2147 2148 2149 2150 2151 2152 2153 2154 2155 2156 2157 2158 2159 2160 2161 2162 2163 2164 2165 2166 2167 2168 2169 2170 2171 2172 2173 2174 2175 2176 2177 2178 2179 2180 2181 2182 2183 2184 2185 2186 2187 2188 2189 2190 2191 2192 2193 2194 2195 2196 2197 2198 2199 2200 2201 2202 2203 2204 2205 2206 2207 2208 2209 2210 2211 2212 2213 2214 2215 2216 2217 2218 2219 2220 2221 2222 2223 2224 2225 2226 2227 2228 2229 2230 2231 2232 2233 2234 2235 2236 2237 2238 2239 2240 2241 2242 2243 2244 2245 2246 2247 2248 2249 2250 2251 2252 2253 2254 2255 2256 2257 2258 2259 2260 2261 2262 2263 2264 2265 2266 2267 2268 2269 2270 2271 2272 2273 2274 2275 2276 2277 2278 2279 2280 2281 2282 2283 2284 2285 2286 2287 2288 2289 2290 2291 2292 2293 2294 2295 2296 2297 2298 2299 2300 2301 2302 2303 2304 2305 2306 2307 2308 2309 2310 2311 2312 2313 2314 2315 2316 2317 2318 2319 2320 2321 2322 2323 2324 2325 2326 2327 2328 2329 2330 2331 2332 2333 2334 2335 2336 2337 2338 2339 2340 2341 2342 2343 2344 2345 2346 2347 2348 2349 2350 2351 2352 2353 2354 2355 2356 2357 2358 2359 2360 2361 2362 2363 2364 2365 2366 2367 2368 2369 2370 2371 2372 2373 2374 2375 2376 2377 2378 2379 2380 2381 2382 2383 2384 2385 2386 2387 2388 2389 2390 2391 2392 2393 2394 2395 2396 2397 2398 2399 2400 2401 2402 2403 2404 2405 2406 2407 2408 2409 2410 2411 2412 2413 2414 2415 2416 2417 2418 2419 2420 2421 2422 2423 2424 2425 2426 2427 2428 2429 2430 2431 2432 2433 2434 2435 2436 2437 2438 2439 2440 2441 2442 2443 2444 2445 2446 2447 2448 2449 2450 2451 2452 2453 2454 2455 2456 2457 2458 2459 2460 2461 2462 2463 2464 2465 2466 2467 2468 2469 2470 2471 2472 2473 2474 2475 2476 2477 2478 2479 2480 2481 2482 2483 2484 2485 2486 2487 2488 2489 2490 2491 2492 2493 2494 2495 2496 2497 2498 2499 2500 2501 2502 2503 2504 2505 2506 2507 2508 2509 2510 2511 2512 2513 2514 2515 2516 2517 2518 2519 2520 2521 2522 2523 2524 2525 2526 2527 2528 2529 2530 2531 2532 2533 2534 2535 2536 2537 2538 2539 2540 2541 2542 2543 2544 2545 2546 2547 2548 2549 2550 2551 2552 2553 2554 2555 2556 2557 2558 2559 2560 2561 2562 2563 2564 2565 2566 2567 2568 2569 2570 2571 2572 2573 2574 2575 2576 2577 2578 2579 2580 2581 2582 2583 2584 2585 2586 2587 2588 2589 2590 2591 2592 2593 2594 2595 2596 2597 2598 2599 2600 2601 2602 2603 2604 2605 2606 2607 2608 2609 2610 2611 2612 2613 2614 2615 2616 2617 2618 2619 2620 2621 2622 2623 2624 2625 2626 2627 2628 2629 2630 2631 2632 2633 2634 2635 2636 2637 2638 2639 2640 2641 2642 2643 2644 2645 2646 2647 2648 2649 2650 2651 2652 2653 2654 2655 2656 2657 2658 2659 2660 2661 2662 2663 2664 2665 2666 2667 2668 2669 2670 2671 2672 2673 2674 2675 2676 2677 2678 2679 2680 2681 2682 2683 2684 2685 2686 2687 2688 2689 2690 2691 2692 2693 2694 2695 2696 2697 2698 2699 2700 2701 2702 2703 2704 2705 2706 2707 2708 2709 2710 2711 2712 2713 2714 2715 2716 2717 2718 2719 2720 2721 2722 2723 2724 2725 2726 2727 2728 2729 2730 2731 2732 2733 2734 2735 2736 2737 2738 2739 2740 2741 2742 2743 2744 2745 2746 2747 2748 2749 2750 2751 2752 2753 2754 2755 2756 2757 2758 2759 2760 2761 2762 2763 2764 2765 2766 2767 2768 2769 2770 2771 2772 2773 2774 2775 2776 2777 2778 2779 2780 2781 2782 2783 2784 2785 2786 2787 2788 2789 2790 2791 2792 2793 2794 2795 2796 2797 2798 2799 2800 2801 2802 2803 2804 2805 2806 2807 2808 2809 2810 2811 2812 2813 2814 2815 2816 2817 2818

✓ 43259

ANTHONY ZAZKOWSKI, a minor, by
ROSE ZAZKOWSKI, his mother and
next best friend,

Appellant,

v.

JOHN CHOYCE,

Appellee.

234 A
APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought to recover damages for personal injuries suffered by plaintiff, an eleven year old child, who was alleged to have been severely burned on premises owned and maintained by defendant, where children had been permitted and invited to play with the knowledge and consent of said defendant for a considerable length of time prior to the occurrence in question. Defendant's motion to strike plaintiff's second amended complaint was sustained, and plaintiff having failed to file any further complaint or to request leave to do so, a judgment order was entered dismissing the suit at plaintiff's costs. Plaintiff appeals.

Inasmuch as the only question presented for determination is as to the sufficiency of plaintiff's second amended complaint (hereinafter for convenience referred to as complaint), it is necessary that same be outlined at length and in detail and for that purpose we quote the following digest of such complaint as set forth in plaintiff's brief:

"Paragraph 1: Charges that, on the day in question (October 23, 1942), the defendant was the owner of and in possession, control and management of the premises involved, including the garage in question.

"Paragraph 2: Charges the defendant with the following conduct:

"(a) Allowing and permitting quantities of highly in-

ANTHONY MARINO, a minor, by
ROSE MARINO, his mother, and
next best friend,

vs.
JOHN CHOYCE,

JOHN CHOYCE,

Defendant.

MR. PRESIDING JUDGE: ...

This action was brought to recover damages for personal

injuries suffered by plaintiff, an eleven-year-old child, who
was alleged to have been unlawfully detained and confined and
maintained by defendant, who is alleged to have been invited to
play with the plaintiff and to have been taken to the residence
and for a considerable length of time, prior to the occurrence
in question. Plaintiff's motion to dismiss defendant's second
amended complaint was denied, and plaintiff's motion to dismiss
defendant's second amended complaint was denied. The court's
judgment order was entered dismissing the suit at plaintiff's
costs. Plaintiff appeals.

Plaintiff is the only person named for determination

as to the sufficiency of plaintiff's second amended complaint
(hereinafter for convenience referred to as complaint), it is
necessary that same be outlined at length and in detail and for
that purpose we quote the following digest of said complaint as
set forth in plaintiff's brief:

"Paragraph 1: Charges that, on the day in question
(October 23, 1942), the defendant was the owner of and in posses-
sion, control and management of the premises involved, including
the garage in question.

"Paragraph 2: Charges the defendant with the following

conduct:

"(a) Allowing and permitting quantities of highly in-

flammable and explosive and dangerous liquids and substances to be stored in his said garage.

"(b) Allowing and permitting children of tender years who resided in said vicinity to constantly and frequently make use of said premises and garage as a playground and place of recreation and amusement.

"(b-1) Said children being constantly and frequently upon said premises and frequenting same in large numbers.

"(b-2) Defendant knowing that all of said children, being of tender years, were too young to understand and appreciate the surrounding dangers or have discretion and judgment commensurate with the inherent danger.

"(b-3) Defendant well knowing, -

"That, by reason of the immediate presence, in said premises and garage, of the said highly inflammable, explosive and dangerous liquids and substances of various kinds and description, said highly inflammable, explosive and dangerous liquids and substances of various kinds and description, constituted, and was, an inherently dangerous condition, by reason of the inherently dangerous proclivities of their bursting into flames and exploding when brought into close proximity with any open flame, bon-fire or any other igniting substance or agency ***."

"(c) Notwithstanding the above knowledge, the defendant consented, allowed, and permitted said children of tender years to be upon, frequent and use the said premises and garage as a playground, as aforesaid.

"Paragraph 3: Charges the following obligations and duties incumbent upon the defendant:

"(a) Under the circumstances, it became and was the duty of the defendant to use ordinary care and precaution to protect such children using the said garage as a playground.

"(b) To see that the said highly inflammable, explosive

flammable and explosive and dangerous liquids and substances to be stored in this said garage.

"(b) Allowing and permitting children of tender years who resided in said vicinity to constantly and frequently make use of said premises and garage as a playground and place of recreation and amusement.

"(c-1) Said children being constantly and frequently upon said premises and frequently come in large numbers.

"(c-2) Defendant knowing that all of said children

being of tender years, were too young to understand and appreciate the surrounding dangers or have discretion and judgment common-rate with the inherent danger.

"(c-3) Defendant well knowing,

"That, by reason of the immediate presence, in said premises and garage, of the said highly inflammable, explosive and dangerous liquids and substances of various kinds and description, said highly inflammable, explosive and dangerous liquids and substances of various kinds and description, constituted, and was, an inherently dangerous condition, by reason of the inherently dangerous possibilities of their bursting into flames and exploding when brought into close proximity with any open flame, bon-fire or any other lighting substance or agency ***."

"(c) Notwithstanding the above knowledge, the defendant consented, allowed, and permitted said children of tender years to be upon, frequent and use the said premises and garage as a playground, as aforesaid.

"Paragraph 3: Charges the following obligations and

duties incumbent upon the defendant:

"(a) Under the circumstances, it became and was the duty of the defendant to use ordinary care and precaution to protect such children using the said garage as a playground.

"(b) To see that the said highly inflammable, explosive

and dangerous liquids and substances in question were kept in a safe condition and storage and not make the same accessible to children who were allowed, permitted, and might be playing in and around the said garage and premises, who might harm or injure themselves by reason of said substances and liquids in question being exploded or ignited.

"Paragraph 4: Charges the defendant with the following violations of his duties and obligations in that behalf:

"(a) Negligently and carelessly storing the highly inflammable, explosive and dangerous liquids and substances in question in such a manner that said cans containing same were easily accessible to such children who might be playing in and about said garage, without using due and ordinary care and precaution to protect such children of tender years from being injured thereby.

"(b) That the plaintiff was in the exercise of all due care and caution as could be reasonably expected for a boy of his age at the time in question.

"Paragraph 5: Alleges as follows:

"That said children of tender years, as aforesaid, had been playing in and about said garage and premises containing said highly inflammable, explosive and dangerous liquids and substances of various kinds and description, as aforesaid, for some time prior to October 23, A. D. 1942, with the knowledge and consent of the defendant."

"Paragraph 6: Alleges as follows:

"(a) On the date in question the plaintiff, 11 years of age, in the company of other children of tender years (including the grandson of the said defendant), came upon and entered said garage for the purpose of playing, as they had been in the habit and custom of doing, with the consent and knowledge of the defendant, as aforesaid.

[illegible]

...the following...

and the fact that the Government has not been able to
to you. I am sure that you will be able to find a way
his name as a friend of the Government.

of the defendant.

and custom of doing, with the consent and knowledge of the defendant, as aforesaid.

"(b) While so playing with the other children, another child took one of the easily accessible cans containing the highly inflammable, explosive and dangerous liquids and substances in question, which had been so carelessly and negligently stored there by the defendant, in an easily accessible place, and played with same.

"(c) While said child (not the plaintiff) was handling said can in his play as aforesaid, said child caused same to be ignited and exploded against and over the plaintiff, and spread over his body in flames and severely burn and injure him.

"Paragraph 7: Charges the following violations of his duty on behalf of the defendant:

"(a) Carelessly and negligently and wrongfully and unlawfully allowing and permitting cans containing the substances in question to be stored in said garage unguarded and unprotected and easily accessible to children of tender years.

"(a-1) With full knowledge that said children were playing in and about said garage.

"(a-2) With full knowledge that said cans containing the substances in question might be handled by said children.

"(b) Failing to protect such children playing in and about the said premises, with his knowledge and consent, by placing said cans containing the dangerous substances in question where they would not be accessible to children, or by keeping said children out of said garage.

"(c) That as the direct result of such negligence and carelessness on the part of the defendant, the plaintiff was called into the garage by the grandson of the defendant on the day in question.

"(c-1) The grandson being a child of tender years.

"(c-2) Playing with a can of the said dangerous substances in question.

"(b) While so playing with the other children, another child took one of the easily accessible cans containing the highly inflammable, explosive and dangerous liquids and substances in question, which had been so carelessly and negligently stored there by the defendant, in an easily accessible place, and played with same.

"(c) While said child (not the plaintiff) was handling said can in his play as aforesaid, said child caused same to be ignited and exploded against and over the plaintiff, and spread over his body in flames and severely burn and injure him.

"Paragraph 7: Charges the following violations of his duty on behalf of the defendant:

"(a) Carelessly and negligently and wrongfully and unlawfully allowing and permitting one or more containing the substances in question to be stored in said garage unsecured and unprotected and easily accessible to children of tender years.

"(a-1) With full knowledge that said children were playing in and about said garage.

"(a-2) With full knowledge that said cans containing the substances in question might be handled by said children.

"(c) Failing to protect such children, lying in and about the said premises, with his knowledge and consent, by placing said cans containing the dangerous substances in question where they would not be accessible to children, or by keeping said children out of said garage.

"(c) That as the direct result of such negligence and carelessness on the part of the defendant, the plaintiff was called into the garage by the grandson of the defendant on the day in question.

"(c-1) The grandson being a child of tender years.

"(c-2) Playing with a can of the said dangerous sub-

stances in question.

"(c-3) Causing one of such cans to ignite and threw the flaming mass over the plaintiff severely burning him.

"Paragraph 8: Charges the defendant with one or more of the following acts of negligence:

"(a) Failure to lock or fasten the door of the garage in question, leaving same open, and allowing children to play in said garage with full knowledge that he had cans of highly inflammable, explosive and dangerous substances of various kinds and description stored there and easily accessible to children.

"(b) Keeping and storing volatile combustibles in such a manner and under such circumstances as to jeopardize life or property in violation of the statute (Smith-Hurd Ill. Annot. Statutes, Chap. 38, Par. 351).

"(c) That, as the direct and proximate result of the improper storage of said volatile combustibles, in violation of said statute, children playing in and about said garage were jeopardized as to their life and property.

"(d) The plaintiff was playing in said garage, with the knowledge and consent of the defendant, in close proximity to said dangerous explosive and inflammable substances and liquids and child so playing was burned by the ignition and explosion which caused flaming mass of liquid to be thrown over his body.

"Paragraph 9: Alleges as follows:

"(a) That the plaintiff, for some time prior to the day in question, was residing in the immediate vicinity of the premises involved, and was frequently accustomed to go on said premises and in said garage -

"(a-1) Where said cans of the dangerous inflammable, and explosive liquids and substances were stored.

"(a-2) Same being left unguarded and easily accessible and unsupervised.

"(b) While so engaged in playing in and about said

"(c-3) Causing one of them to come to light and throw

the flaming mass over the plaintiff severely burning him.

"Paragraph 8: Charges the defendant with one or more of

the following acts of negligence:

"(a) Failure to lock or latch the door of the garage

in question, leaving it open, and allowing children to play

in said garage with full knowledge of the fact that said

inflammable explosive and dangerous substances of various kinds

and description stored there, and easily accessible to children.

"(b) Keeping and storing volatile combustibles in such

a manner and under such circumstances as to jeopardize life or

property in violation of the statute (Mich. Stat. 1929, Sec. 11, Act 11, 1929).

Statutes, Chap. 38, Sec. 11).

"(c) That, as the direct and proximate result of the

improper storage of said volatile combustibles, in violation of

said statute, children playing in and about said garage were

jeopardized as to their life and property.

"(d) The plaintiff was playing in said garage, with the

knowledge and consent of the defendant, in close proximity to

said dangerous explosive and inflammable substances and liquids

and child so playing was burned by the ignition and explosion

which caused flaming mass of liquid to be thrown over his body.

"Paragraph 9: Alleges as follows:

"(a) That the plaintiff, for some time prior to the day

in question, was residing in the immediate vicinity of the

premises involved, and was frequently accustomed to go on said

premises and in said garage -

"(a-1) Where said cans of the dangerous inflammable, and

explosive liquids and substances were stored.

"(a-2) Same being left unguarded and easily accessible

and unsupervised.

"(b) While so engaged in playing in and about said

premises another child in the course of his play looked over, took and played with one of said cans or receptacles containing the substances in question and while so handling same it was caused to be ignited and thrown upon the plaintiff and spread all over his body in flames and severely burn and injure him.

"(c) Charges that 'all of which the defendant, in the exercise of due care, knew, or should have known.'

"Paragraph 10: Charges the defendant with the following violations of duty:

"(a) Defendant carelessly, negligently, wrongfully and unlawfully allowing cans of the substances and liquids in question to be stored in an unguarded place unprotected and easily accessible and attractive to children of tender years, including the plaintiff.

"(b) Defendant negligently and carelessly failed and neglected to keep said children of tender years, including the plaintiff, out of said premises.

"(c) Failed and neglected to warn and advise said children of the danger therein contained and of the dangerous proclivities of said substances and liquids involved.

"(d) That, as a result of this carelessness, at the time in question, the plaintiff, playing in the premises with the other children, was injured by the ignition and explosion with consequent throwing of the flaming mass of liquid over his body.

"Paragraph 11: Charges the defendant with the following wilful and wanton conduct:

"(a) Wilfully, wantonly, and with a conscious indifference to surrounding circumstances, allowing and permitting the cans containing the substances and liquids in question to be stored in said garage in full view of the children which he permitted to play therein.

"(b) Leaving same in an unguarded and unprotected and

premises another child in the course of his play looked over,
took and played with one of said cans or receptacles containing
the substances in question and while so handling same it was
caused to be ignited and burned upon the child's leg and spread
all over his body in places where it was not seen and injured him.
The father of said child testified that in the

exercise of his duty, he was not aware of the following
violations of duty:

(a) That the said child was not properly supervised and
that the said child was not properly instructed in the use of
the said cans or receptacles and that the said child was not
properly instructed in the use of the said cans or receptacles
and that the said child was not properly instructed in the use
of the said cans or receptacles and that the said child was not
properly instructed in the use of the said cans or receptacles.

(b) That the said child was not properly supervised and
that the said child was not properly instructed in the use of
the said cans or receptacles and that the said child was not
properly instructed in the use of the said cans or receptacles
and that the said child was not properly instructed in the use
of the said cans or receptacles and that the said child was not
properly instructed in the use of the said cans or receptacles.

(c) That the said child was not properly supervised and
that the said child was not properly instructed in the use of
the said cans or receptacles and that the said child was not
properly instructed in the use of the said cans or receptacles
and that the said child was not properly instructed in the use
of the said cans or receptacles and that the said child was not
properly instructed in the use of the said cans or receptacles.

(d) That the said child was not properly supervised and
that the said child was not properly instructed in the use of
the said cans or receptacles and that the said child was not
properly instructed in the use of the said cans or receptacles
and that the said child was not properly instructed in the use
of the said cans or receptacles and that the said child was not
properly instructed in the use of the said cans or receptacles.

exposed condition and easily accessible to said children of tender years.

"(c) Wilfully and wantonly and with conscious indifference to surrounding circumstances, allowing, permitting and inviting children to come in and play in and around said cans or receptacles, knowing the danger thereof.

"(d) That as the result of said wilful and wanton conduct and conscious indifference on the part of the defendant, the plaintiff was injured by the exploding and bursting into flame of the substances in question, with the consequent throwing of the flaming mass upon his body.

"Paragraph 12: Recites, as a direct and proximate result of the negligence and wanton and wilful conduct of the defendant as set forth and charged in the preceding paragraphs, that the plaintiff was severely and permanently injured, as specified, and setting of the plaintiff addanum^[ad damnum]in the sum of Fifty Thousand (\$50,000.00) Dollars."

Plaintiff's theory as stated in his brief is that "the allegations set forth in plaintiff's Second Amended Complaint, if taken as true, which, for the purposes of passing upon the defendant's Motion to Strike, the Trial Court was required to assume, set forth and constituted a valid and substantial cause of action requiring an Answer by the defendant, to the merits, in order to avoid a judgment in favor of the plaintiff."

Plaintiff's action is not predicated upon the doctrine of attractive nuisance and, briefly stated, his complaint charges that defendant allowed and permitted children of tender years to use the garage on his premises as a place of recreation and amusement, with full knowledge that he had stored therein quantities of highly inflammable, explosive, and dangerous liquids and substances of various kinds, which were inherently dangerous because of their inherently dangerous proclivities of bursting into flame

exposed condition and easily accessible to said children of tender years.

"(c) Initially and knowingly and with conscious indifference to surrounding circumstances, allowing, permitting and in- viting children to come in and play in and around said area of receptacles, known as the danger zone."

"(d) That as the result of said fall and when said and conscious interference on the part of the defendant, the plaintiff was injured by the exploding and bursting into flame of the substances in question, with the consequent throwing of the flaming mass upon his body."

"Paragraph 12: That, as a direct and proximate result of the negligence and wanton and malicious conduct of the defendant as set forth and charged in the preceding paragraphs, that the plaintiff was severely and permanently injured, as detailed, and setting of the plaintiff's damages in the sum of Fifty Thousand (\$50,000.00) Dollars."

Plaintiff's theory is stated in his brief is that "the allegations set forth in Plaintiff's second amended complaint, if taken as true, which, for the purposes of passing upon the defendant's motion to strike, the trial court was required to assume, set forth and constituted a valid and substantial cause of action requiring an answer by the defendant, to the merits, in order to avoid a judgment in favor of the plaintiff."

Plaintiff's action is not predicated upon the doctrine of attractive nuisance and, briefly stated, his complaint charges that defendant allowed and permitted children of tender years use the garage on his premises as a place of recreation and amuse- ment, with full knowledge that he had stored therein quantities of highly inflammable, explosive, and dangerous liquids and substances of various kinds, which were inherently dangerous because of their inherently dangerous propensities of bursting into flame

and exploding, if brought into close proximity to any open flame, bonfire, or any other igniting substance or agency; that, by reason of these circumstances, it was his duty to use reasonable care to protect such children from the inherent danger, which he did not do; and that, while a number of children, including plaintiff, were in and about the garage, another child took and played with a can or receptacle containing one of the substances in question and, while handling same, cause it to be ignited and thrown upon plaintiff, injuring him as claimed.

The law controlling a factual situation such as is alleged in plaintiff's complaint was enunciated in Gritton v. Tr. Inc., 247 Ill. App. 395 (certiorari denied), where the court said at pp. 401-402:

"The first point made by appellant is that appellee cannot recover because the maintenance of its switch track and the trolley poles and wires did not create an attractive nuisance, and, even if it did, the place where the accident occurred was not visible from any point where appellee had a lawful right to be. McDermott v. Burke, 256 Ill. 401, 402; St. Louis v. T. H. R. Co. v. Bell, 81 Ill. 76. In our opinion the answer to each of these propositions is, that it is immaterial under the facts in this case whether the conditions mentioned constituted an attractive nuisance or not, and the allegations in the declaration to that effect may be treated as surplusage, because the maintenance of the trolley and feed wires charged with a large voltage of electricity created an agency dangerous to life and limb and appellant had knowledge that the locality where this agency was maintained, was commonly used as a playground for little children under the age of discretion, and it was in duty bound to at least use ordinary care to protect them from receiving injuries thereby. In the case of City of Pekin v. McMahon, 154 Ill. 141, 148, the Court cited with approval the following proposition: 'The owner of land, where children are allowed or accustomed to play, particularly if it is unfenced, must use ordinary care to keep it in safe condition; for they being without judgment and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers and mere licensees.' In the case of Ramsay v. Tuthill Building Material Co., 295 Ill. 395, the Supreme Court very lucidly and forcibly announces the principle which we believe is applicable to the facts in this case. It is there said: 'It is not necessary, to make a defendant liable, that the attractive and dangerous thing should be visible from the street and that children should have been attracted to the premises by it. If an owner maintains dangerous conditions upon his premises to which he permits children to come he must use ordinary care to guard them against danger which their youth and ignorance prevent them from appreciating. There is no implied invitation from the mere existence of a dangerous attraction which is not discoverable off the premises, but if to the knowledge of the owner children habitually come upon his

[illegible]

premises where a dangerous condition exists to which they are exposed, the duty to exercise care for their safety arises, not because of an implied invitation but because of his knowledge of unconscious exposure to danger which the children do not realize." (Italics ours.)

It is generally held that the act of a child causing the explosion or ignition of an inherently dangerous commodity which is left in a place accessible to children or where they are wont to congregate is not such an intervening cause as will relieve the owner of such commodity from liability for a breach of his duty. (Bunyan v. American Glycerin Co., et al., 230 Ill. App. 351; Haas v. Mordman, 284 Ill. App. 103.)

Plaintiff contends that "It is the prima requisite of good pleading that the pleader set forth ultimate, not evidentiary, facts, even though, strictly speaking, these ultimate facts may be in the nature of conclusions. It is never good pleading to plead evidentiary facts."

Defendant's motion to strike plaintiff's complaint specifically criticized certain paragraphs thereof as stating "mere conclusions," "erroneous conclusions," and "false conclusions." The allegations in the paragraphs referred to are in reality allegations of ultimate facts, even though they are in the nature of conclusions, and sufficient facts were averred in connection with and surrounding the occurrence, upon which to predicate the allegation of such ultimate facts. In discussing this question in Carlton v. Smith, 285 Ill. App. 380, the court said at pp. 383-38

"The rule appears to be that it is competent for the pleader to allege ultimate facts, notwithstanding that they to an extent represent conclusions. Crane v. Schaefer, 140 Ill. App. 647; Curtiss v. Livingston, 36 Minn. 300, 31 N. W. 357; California Packing Corp. v. Kelly Storage & Distributing Co., 228 N. Y. 49, 126 N. E. 269; Western Travelers' Accident Ass'n v. Funson, 73 Neb. 858, 103 N. W. 688; Rudd v. Rudd, 223 Mo. App. 472, 13 S. W., (2) 1032.

"The averment of such ultimate fact is necessarily a conclusion drawn from intermediate and evidential facts, and we are of opinion that appellants could not differently have charged the fact unless they had pleaded the evidential matters from which the deduction was made, which would have been repugnant to the fundamental rule that evidence should not be pleaded. Zimmerman v.

Willard, 114 Ill. 364. We do not think the objection thus argued is tenable, and are of opinion that the demurrer to these counts should have been overruled."

(To the same effect is Roumbos v. City of Chicago, 332 Ill. 70.)

As already stated the complaint sufficiently alleged the facts in connection with and surrounding the occurrence. It alleged defendant's duty. It charged his negligent breach of duty. It alleged that plaintiff's injuries were directly and proximately caused by defendant's negligent breach of duty.

The first ten paragraphs of the complaint are concerned with plaintiff's charge of negligence against defendant and paragraph eleven thereof, heretofore set forth, assumes to charge defendant with wilful and wanton conduct. The charge of wilful and wanton conduct should have been alleged in a separate count and such count should necessarily have contained allegations as to all of the essential elements of a cause of action. The allegations of paragraph eleven are wholly insufficient, standing alone, to state a cause of action against defendant for wilful and wanton conduct and said paragraph does not incorporate therein by reference any of the previous allegations of the complaint. We think that that portion of the complaint which assumed to charge defendant with wilful and wanton conduct was clearly insufficient.

While plaintiff's complaint is somewhat verbose and many of the allegations thereof are unduly repetitious, such verbosity and repetition cannot destroy the sufficiency of a complaint when it is otherwise good. After a careful analysis of all the averments thereof we are impelled to hold that the complaint sufficiently states a cause of action as to defendant's alleged negligence.

For the reasons stated herein the order of the Circuit court of Cook county sustaining defendant's motion to strike plaintiff's second amended complaint in so far as it charged defendant with negligence and the judgment order of said court dis-

-11-

missing this case are reversed and the cause is remanded with directions to require defendant to answer the second amended complaint in so far as it charges him with negligence and that such further proceedings be had as are not inconsistent with the views herein expressed.

ORDERS REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Friend and Scanlan, JJ., concur.

✓43228

3241A.382²

THE HAMBURGER COMPANY, a corporation,

Plaintiff - Appellee,

v.

L.J. MAYER,

Defendant - Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

210

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

A statement of claim filed in the Municipal Court of Chicago on January 22, 1942 by The Hamburger Company against L. J. Mayer, alleged that defendant owed a balance of \$1,500 for monies advanced to him while he was employed by plaintiff; that on June 24, 1938 it was agreed in writing between them that there was due to plaintiff \$1,500, the agreement being attached as an exhibit; and plaintiff asked judgment for \$1,815, being the balance due plus interest claimed because of an unnecessary and vexatious delay. Seven writs summoning the defendant were returned marked "not found". The eighth summons was served on the defendant on June 11, 1942. He filed a special appearance and jury demand and a motion to quash the return showing service of the summons. This motion was denied and the special appearance was ordered to stand as a general appearance. On August 18, 1942 defendant filed his "defence". Plaintiff's motion to strike this "defence" was overruled. On September 1, 1942 on motion of plaintiff the court ordered defendant to appear before a notary public for the taking of his deposition. Defendant did not appear. The record shows that on September 1, 1942 the Chief Justice ordered the case placed on the next jury calendar and that on September 13, 1943, he assigned the case to trial calendar No. 1 as No. 335, to be tried in courtroom 905 City Hall. The record also shows that the case appeared on the trial calendar of Judge Joseph J. Drucker in room 905 City Hall on April 25, 1944. Continuances were allowed on defendant's motions

THE HANSEN COMPANY, a corporation,

Plaintiff - Appellee,

v.

L. J. HAYES,

Defendant - Appellant.

MR. JUSTICE BREWER delivered the opinion of the court.

A statement of facts is set forth in the opinion of the court.

Chicago on January 1, 1942, the defendant, L. J. Hayes, advised

L. J. Hayes, advised that defendant had a balance of \$1,000.00 for

monies advanced to him by the plaintiff, which he had expended; that

on June 24, 1942, he advised the plaintiff that the balance there

was due to plaintiff \$1,000.00, the defendant also advised that an

exhibit and affidavit were submitted on June 24, 1942, being the

balance due plaintiff, which was \$1,000.00, and an affidavit and

verification being submitted, the defendant was returned

without "set back". The plaintiff then filed in the defendant's

on June 11, 1942, a motion for summary judgment and jury demand

and a motion to quash the return for lack of due diligence.

This motion was denied and the return for lack of due diligence was

stood as a general appearance. On August 17, 1942, defendant filed

his "defense". Plaintiff's motion to strike this "defense" was

overruled. On September 1, 1942, on motion of plaintiff the court

ordered defendant to appear before a notary public for the taking

of his deposition. Defendant did not appear. The record shows

that on September 1, 1942, the chief justice ordered the case placed

on the next jury calendar and that on September 15, 1942, he assigned

the case to trial calendar No. 1 as No. 353, to be tried in courtroom

908 City Hall. The record also shows that the case appeared on

the trial calendar of Judge Joseph J. Brucher in room 908 City Hall

on April 23, 1944. Continuances were allowed on defendant's motion

to April 26, 1944, to May 15, 1944, to June 5, 1944 and June 6, 1944.

On June 6, 1944 the case was again called for trial.

Plaintiff's attorney answered that plaintiff was ready. Defendant's attorney stated that he was not ready and that he wished a continuance, supporting his request by an affidavit sworn to by himself. The affidavit recited that defendant, to the best of affiant's knowledge, was not then in Chicago; that defendant left for California on or about April 15, 1944 for the purpose of conducting certain business dealings, and also for the purpose of visiting his wife; that on May 9, 1944 affiant was advised by defendant that defendant's wife was operated on for a fibrous tumor; that she was very seriously ill; that it appeared to him that she would be ill for a long time and that he expected to remain in California until the end of June "or perhaps to July"; that on May 29, 1944 affiant received a letter from his associate attorneys in Los Angeles, who were handling a matter for defendant, advising him (affiant) that defendant would "possibly leave California for Chicago on May 31, 1944"; that to the best of affiant's knowledge defendant had not arrived in Chicago; that affiant telephoned the Seneca Hotel "where the said L. J. Mayer had formerly resided", and was advised that he had not re-registered there; that affiant called the Manhattan Brewery Company, which employed defendant, and was advised that defendant had not reported for duty, and to the best "of their knowledge was still out of town"; and affiant asked the court to continue the case until such time as his client "will arrive in Chicago". The attorney for plaintiff informed the court that he had his witnesses in court ready to proceed. The court informed defendant's attorney that when a previous continuance was granted he informed him that he would "hold" him for trial, and stated that the affidavit was not in conformity with the statute. The court inquired as to who filed the

to April 20, 1944, to May 12, 1944, to June 2, 1944 and June 8, 1944.
On June 8, 1944 the same was held for trial.

Plaintiff's attorney requested that the court appoint a commissioner, attorney stated that he had not done so and that he had not appointed a commissioner, supporting his request on the ground that the court had not done so. The affidavit recited that the court had not done so, and that the court had not done so. It was not then in Chicago; that the court had not done so, and that the court had not done so. About April 15, 1944 the court had not done so, and that the court had not done so. Dealings, and that the court had not done so, and that the court had not done so. May 9, 1944 Plaintiff's attorney had not done so, and that the court had not done so. was operated on for a kidney stone; that the court had not done so, and that the court had not done so. It; that it was not in Chicago; that the court had not done so, and that the court had not done so. and that he was not in Chicago; that the court had not done so, and that the court had not done so. "or business as usual; that the court had not done so, and that the court had not done so. from his residence; that the court had not done so, and that the court had not done so. matter for Plaintiff; that the court had not done so, and that the court had not done so. "possibly leave Plaintiff for a while; that the court had not done so, and that the court had not done so. the fact of Plaintiff's knowledge that he had not done so, and that the court had not done so. that Plaintiff had not done so, and that the court had not done so. Mayor had formerly resided, and that the court had not done so, and that the court had not done so. registered there; that the court had not done so, and that the court had not done so. which employed defendant, and that the court had not done so, and that the court had not done so. reported for duty, and that the court had not done so, and that the court had not done so. out of town; and Plaintiff asked the court to continue the case until such time as his client "will arrive in Chicago". The attorney for Plaintiff informed the court that he had his witnesses in court ready to proceed. The court informed defendant's attorney that when a previous continuance was granted he informed him that he would "hold" him for trial, and stated that the affidavit was not in conformity with the statute. The court inquired as to who filed the

jury demand. On being informed that the defendant did so, the court stated to defendant's attorney that if he would waive the jury trial he would grant a week's continuance. In making this request the court gave consideration to the fact that jury trials in cases of that character would not be held during the summer months, and that if defendant would waive a trial by jury the case could be continued and tried without a postponement until the fall. Defendant's attorney did not give a direct answer to the court's suggestion, but stated that he could not know "very honestly whether he [defendant] will be back in Chicago today, tomorrow or next month", and that he did not know where he could contact defendant. The court stated that he would hold the case for trial, whereupon defendant's attorney stated that he could not present any defense and that he would leave the courtroom. He did leave the courtroom. Thereupon a jury was impaneled and sworn. Testimony was received on an ex parte trial and a verdict in favor of plaintiff was returned for \$1,871.18 and judgment was entered on the verdict. Defendant, appealing, asks that the judgment be reversed and that the cause be remanded for trial.

On June 19, 1944 defendant moved that the court vacate the judgment and that the cause be reset for trial. He supported this motion by his affidavit, which recited that on April 16, 1944, at the request of his attorney, he left for Los Angeles, California for the purpose of adjusting certain business dealings; that he arrived there on April 24, 1944; that he remained until May 27, 1944; that during that time he was engaged with his California attorneys in adjusting certain business dealings; that during his stay in California his wife was operated on for a fibrous tumor; that she was seriously ill; that it became necessary for him to remain there as long as possible during her illness; that from May 27, 1944, when he left California for the purpose of returning to Chicago, he was

traveling and "could not be contacted" by his attorney; that he arrived in Chicago on June 6, 1944, when he was informed of the entry of the judgment; that he was not guilty of any negligence or laches and that he has a good and meritorious defense to plaintiff's claim. An affidavit of defendant's attorney also presented in support of the motion to vacate the judgment, stated that the case did not appear on the jury calendar issued in September, 1943; that he checked and inspected the file monthly to ascertain whether the case had been assigned to any judge or room for trial; that each time he made an inspection of the file he thoroughly inspected the "half sheets"; that he did not notice any assignment of the cause to a trial calendar; that he last made an inspection of the file on or about March 1, 1944; that at that time there was no entry upon the half sheet showing that the case had been placed on any jury calendar or assigned to any court for trial; that on April 10, 1944 when he consulted with defendant with reference to the latter going to California, he discussed the case and advised him that inasmuch as it was not on any trial call it would be "satisfactory" for defendant to go to California; that affiant did not know that the cause was "purportedly" placed on a jury calendar until April 17, 1944; that then he had a conversation with one of the attorneys for plaintiff in which the latter stated to him (affiant) that he knew that the cause had not been placed on a jury calendar in September, 1943, and did not know how to explain the notation on the half sheet "purportedly" assigning the cause to a jury calendar in September, 1943; that on April 26, 1944, when the matter appeared on the trial call, affiant advised the court and the attorney for plaintiff that defendant was still in California; that he so advised them again on May 15, 1944; that on June 5, 1944 he again advised the court that his client was not in Chicago, but that he expected him momentarily, and that he would ask for a short continuance so that his client could have his day in court; and that on June 6, 1944 he reiterated his request for a continuance.

Defendant urges that "since trial calendars are prepared and distributed for the purpose of furnishing the members of the bar with authentic information as to what cases are liable to be called for trial and the order in which they will be called, and such calendars emanate from the court itself and are prepared by and under the supervision of its officers, attorneys are entitled to look to them for their information and guidance". Section 8 of the act governing the Municipal Court of Chicago, (Sec. 363, Ch. 37, Ill. Rev. Stat. 1943) provides that the Chief Justice shall assign the associate judges to duty in the branch courts from time to time as he may deem necessary for the prompt disposal of the business; that he shall superintend the preparation of the calendars of cases for trial and make such classification and distribution of the cases upon different calendars as he may deem proper and expedient. The record shows that on September 1, 1942 the case was ordered placed on the next jury calendar, and that on September 13, 1943 an order was entered placing the case on a trial calendar to be heard in courtroom 905, City Hall. The affidavits filed by defendant show that on April 17, 1944 he knew that the case was then assigned to a jury calendar. Continuances were granted to defendant from April 25, 1944 to the following day; from then until May 15, 1944; then until June 5, 1944 and then until the following day.

The position of defendant's attorney appears to be that when his client left for California, he had a right to assume that the case would not be called for trial while his client was away, the case not having been assigned to a jury calendar, and that when he learned that the case was set for trial he was unable to communicate with his client. There is no explanation as to why defendant could not communicate with his attorney, or why the defendant could not be contacted through the attorney in California who was representing him in a matter which required his attention there. With knowledge that

the case was on the jury calendar, defendant obtained continuances. In our opinion the case was properly placed on the jury call.

Defendant urges that he and his attorney exercised reasonable diligence; that the motion for a continuance should have been granted; that he has a good and meritorious defense; and that in refusing to vacate the judgment there was an abuse of discretion. Rule 56 of the Municipal Court of Chicago states that additional time may be granted on good cause shown, in the discretion of the court, and on such terms as may be just, for the doing of any act or the taking of any step or proceeding prior to judgment in any civil action. Rule 79 reads: "Except as provided in these rules the practice in the Municipal Court shall be the same, as near as may be, as that which may, from time to time, be prescribed by law (including the Rules of the Supreme Court of Illinois) for similar suits and proceedings in Circuit Courts". Pursuant to Sec. 59 of the Civil Practice Act, Pars. (1), (2), (5) and (8) of Rule 14 of the Supreme Court were adopted, and read:

"(1) When either party shall apply for a continuance of a cause on account of the absence of material evidence, the motion shall be supported by the affidavit of the party so applying or his authorized agent, showing that due diligence has been used to obtain such evidence, or the want of time to obtain it, and of what particular fact or facts the same consists, and if the evidence consists of the testimony of a witness, his place of residence, or if his place of residence is not shown, showing that due diligence has been used to ascertain the same, and that if further time is given such evidence can be procured.

"(2) Should the court be satisfied that such evidence would not be material, or if the other party will admit the affidavit in evidence as proof only of what the absent witness would testify to if present, the continuance shall be denied unless the court, for the furtherance of justice, shall deem a continuance necessary.

"(5) The court may on its own motion, or with the consent of the adverse party, continue a cause for trial to a later day.

"(6) No motion for the continuance of a cause made after the cause has been reached for trial shall be heard, unless a sufficient excuse is shown for the delay."

Rule 14 of the Supreme Court is applicable to the practice in the Municipal Court of Chicago. When a continuance is sought on account of the absence of a witness, the affidavit must set forth

the case was on the jury's return, defendant's counsel submitted.

In our opinion the case was properly tried on the jury bill.

Defendant's motion for a new trial is overruled.

Also directed: that the jury be instructed that the burden of proof is on the plaintiff.

granted; that the jury be instructed that the burden of proof is on the plaintiff.

returning to the jury the following instructions: (1) The plaintiff has the burden of proof.

Rule 38 of the Uniform Rules of Evidence provides that the burden of proof is on the plaintiff.

time may be taken by the plaintiff to introduce evidence in support of his claim.

occur, and to the jury the following instructions: (2) The burden of proof is on the plaintiff.

of the fact that the plaintiff has introduced evidence in support of his claim.

civil action. The burden of proof is on the plaintiff.

the practice in the civil action is that the burden of proof is on the plaintiff.

may be, the burden of proof is on the plaintiff.

(including the fact that the plaintiff has introduced evidence in support of his claim).

wise and appropriate in the civil action. The burden of proof is on the plaintiff.

the civil action. The burden of proof is on the plaintiff.

the Supreme Court has held that the burden of proof is on the plaintiff.

"(1) When a plaintiff brings an action, he has the burden of proof.

evidence of the fact that the plaintiff has introduced evidence in support of his claim.

shall be understood by the jury that the burden of proof is on the plaintiff.

his authorized agent, and the jury shall be instructed that the burden of proof is on the plaintiff.

obtain such evidence, and the jury shall be instructed that the burden of proof is on the plaintiff.

particular case, the burden of proof is on the plaintiff.

consists of the testimony of the plaintiff, and the jury shall be instructed that the burden of proof is on the plaintiff.

or if his claim of residence is not proved, the burden of proof is on the plaintiff.

has been made to establish the fact that the plaintiff is the owner of the property.

given such evidence and the jury shall be instructed that the burden of proof is on the plaintiff.

"(2) Should the jury be instructed that the burden of proof is on the plaintiff.

would not be required, and the jury shall be instructed that the burden of proof is on the plaintiff.

in evidence as to the fact that the plaintiff has introduced evidence in support of his claim.

to its present, the defendant shall be required to introduce evidence in support of his claim.

the furtherance of justice, shall have a reasonable opportunity to introduce evidence in support of his claim.

"(3) The court may in its discretion, or with the consent of the parties, continue a case for trial at a later day.

of the adverse party, continue a case for trial at a later day.

"(4) The motion for the continuance of a case shall be granted only if the court is satisfied that the continuance is necessary.

the cause has been reached for trial, and the court shall be instructed that the burden of proof is on the plaintiff.

Rule 14 of the Uniform Rules of Evidence provides that the burden of proof is on the plaintiff.

in the Municipal Court of Chicago. When a continuance is granted in

account of the absence of a witness, the plaintiff must not return

the facts to be proved by the witness for the purpose of enabling the plaintiff to avoid the delay, if he chooses, by admitting the affidavit in evidence as proof of what the witness would testify to if present. In the instant case there was no attempt to comply with the requirements of Rule 14. The affidavit filed on June 6, 1944 did not set out what defendant's testimony would be if he were introduced as a witness. Had defendant's attorney presented an affidavit conforming to Rule 14, plaintiff would have an opportunity of admitting that the absent witness would testify as set out in the affidavit if he were present, or of contending that the expected testimony would not be material. Par. 2 of Rule 14 provides that should the court be satisfied that such evidence would not be material, or if the other party will admit the affidavit in evidence as proof only of what the absent witness would testify to if present, the continuance shall be denied unless the court, for the furtherance of justice, shall deem a continuance necessary. It was not necessary that defendant, as a party, be present at the trial. There was no showing that his testimony, if offered, would be material. There was no effort made by defendant to present his testimony through a deposition. In fact, there was no explanation why he did not comply with the order of the court entered about 18 months before the trial, that he appear before a notary public and give his deposition. We are satisfied that the trial judge in denying a continuance to the defendant, did not abuse the discretion vested in him. The record shows that defendant's rights were given due consideration. At the time the motion for continuance was being considered, the attorney for the defendant stated in answer to the court's offer to give a week's continuance if the jury should be waived, that he did not know whether his client would return to Chicago "today, tomorrow or next month", and that he did not know where he could contact him.

The affidavits in support of the motion to vacate the judgment did not make any showing to justify the motion and the court did not err in denying the motion.

For the reasons stated, the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

KILEY, and LUPE, JJ. CONCUR.

The following is a list of the names of the persons who have been
 named in the report of the committee on the subject of the
 investigation of the case of the late Mr. J. H. Smith, who
 was killed by a train on the 1st of May, 1901.

George H. Smith, deceased.

Wm. H. Smith, deceased.

✓ 42451

MARTHA RAKOWSKI and HELEN LANGOWSKI,

Appellees,

v.

METROPOLITAN LIFE INSURANCE COMPANY,
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

A

16

3241A-83

MR. JUSTICE LUPE DELIVERED THE OPINION OF THE COURT.

Plaintiffs instituted this proceeding as beneficiaries on two policies issued by the defendant Metropolitan Life Insurance Company on the life of Wladyslaw Rakowski who departed this life on July 8, 1940. Upon the trial of this cause before the court without a jury the issues were found for the plaintiffs and judgment was entered against the defendant in favor of plaintiff Martha Rakowski in the sum of \$651 and in favor of plaintiff Helen Langowski in the sum of \$390.60. This appeal followed.

The Metropolitan Life Insurance Company, defendant herein, issued two policies of insurance upon the life of Wladyslaw Rakowski, Policy No. 132074527, dated November 27, 1939 (plaintiff's exhibit 1) in the sum of \$510, with the plaintiff Martha Rakowski, widow of the insured, as beneficiary, and the other policy bearing number 132169742, dated December 18, 1939, in the sum of \$186, with the plaintiff Helen Langowski, daughter of the insured, as beneficiary. Each of the policies provided for the payment of double their face value in the event the insured's death resulted from bodily injuries caused solely through external, violent and accidental means independent of all other cause. There was no dispute upon the trial that the death of the insured did result from bodily injuries independent of all other cause as specified in the policies, so that plaintiffs if entitled to recover were entitled to recover double the face value of the policies.

WILLIAM HANCOCK and others

Plaintiffs

v.

THE NEW YORK LIFE INSURANCE COMPANY
a corporation

Defendant

THE NEW YORK LIFE INSURANCE COMPANY

on two policies issued by the defendant company on July 6, 1910. From the time of the death of the insured without a jury and a verdict was entered against the defendant company in the sum of \$100,000. The defendant company issued two policies of insurance on the life of the insured, policy No. 1234567, dated January 1, 1910, and policy No. 1234568, dated July 6, 1910, both policies providing for the payment of the face value in the event the insured should die from bodily injury caused solely through external, violent and accidental means independent of all other cause. There was no dispute upon the trial that the death of the insured did result from bodily injury independent of all other cause as specified in the policies, and that plaintiffs are entitled to recover the face value of the policies.

The policies involved contained identical provisions. Under the heading, "When Policy is Contestable and when Voidable", it is provided, "If (1) within two years prior to the date of issue of this policy the insured has been a patient at, or an inmate of, any institution for the treatment of physical or mental disease, or has undergone any surgical operation, or has been attended by a physician, unless it shall be shown by the insured or any claimant that no such institutional, surgical, or medical treatment or attention was for a serious disease, injury, or physical or mental condition, * * * this policy shall be voidable by the company, unless reference to such institutional, surgical, or medical treatment or attention, * * * is endorsed on this policy by the company." It was further provided in said policy that, "this policy shall not be voidable because of absence therefrom of endorsement referring to any information which was disclosed in a written application therefor."

The evidence shows that the insured was on July 14, 1938, admitted to the Cook County Hospital, and that he remained there until August 7, 1938. His condition while there was diagnosed as pernicious anemia. He was again admitted to the Cook County Hospital on May 24, 1939, where he remained until June 12, 1939, and his condition was again diagnosed as pernicious anemia. The record discloses other cases of medical treatment of the insured in the two-year period immediately preceding the issuance of the policies sued upon.

In each application for a policy it is stated that the insured had not been under the care of any physician within the past three years and that he had not been under any treatment in any clinic, dispensary, or hospital within the past five years. The defendant herein, having alleged and proved hospital and medical treatment within two years prior to the issuance of the policies, the burden was upon the plaintiffs to prove that such hospital or medical treatment was not for a serious disease.

This court, on a former appeal (Rakowski v. Metropolitan Life Insurance Company, 313 Ill. App. 579, at page 584) said:

"This form of policy has been passed upon by this court in the case entitled Gambill v. Metropolitan Life Ins. Co., 312 Ill. App. 538, and courts of other jurisdictions have done so repeatedly, holding that where the defendant alleges and proves hospital or medical attention or treatment within the two years prior to the issuance of the policies, the burden is then upon the plaintiff to prove that such hospital or medical attention or treatment is not for a serious disease."

Since the former appeal plaintiffs by leave of court filed an amendment to their statement of claim wherein they allege the defendant waived the terms and conditions of the clause of the policy referred to in its defense, and that defendant had full notice and knowledge of the fact that the insured had been treated for a disease within two years before the date of the policy and failed to endorse such knowledge on the policies and therefore are liable for plaintiff's demand.

Defendant filed its general denial to this amendment. The question of the seriousness of the disease, however, was not controverted and the question presented was whether the defendant had waived this provision of the policies. On this question the court found that the defendant had waived such provision, basing its decision upon the testimony of the plaintiffs as to conversations had with John Cerven the agent, who took the applications for the policies involved herein. As to the knowledge of said Cerven that the insured had been in the hospital and had medical treatment prior to the applications for and the issuance of the policies, the trial court held that the knowledge of Cerven was knowledge of the defendant, and because the policies were issued with such knowledge of Cerven, whom the court found to be an agent of the defendant, that the defendant had waived the condition in the policies wherein it was stated that if the insured had a serious illness within two years from the dates of the policies the same shall be voidable by the company.

Defendant contends that no authority is shown in Agent Cerven whereby he was empowered or authorized to waive any of the provisions of the policies. One of the provisions contained in both policies is as follows: "This policy includes all matter printed or written by the company on this and following pages and constitutes the entire agreement. Its terms cannot be waived by any agent and cannot be changed except by endorsement hereon by the secretary." In the present case the record shows that there was evidence that Cerven was the agent of the defendant insurance company; that he took the applications for the policies, filled them out in his own handwriting, turned them over to the company, delivered the policies when issued to the insured, and thereafter collected the premiums thereon. This evidence is not refuted and therefore we must necessarily hold that Cerven as the agent for defendant had power to waive the provision in the policies hereinabove referred to. In the case of Hancock Life Ins. Co. v. Schlink, 175 Ill. 284, which has been repeatedly followed and quoted with approval in this State, the court said, at page 290:

"As to the second contention, while it is true that the policy provides that no person except the president or secretary is authorized to make alterations, discharge contracts or waive forfeitures, yet if Ballance was the agent of appellant, as we think he was, with power to solicit insurance of Schlink, receive the application, forward it to appellant, receive the policy when issued, collect the premium and deliver the policy, then he had power to waive a condition of the policy.

"In Eclectic Life Ins. Co. v. Fahrenkrug, 68 Ill. 463, it was said (p. 467): 'It is insisted * * * by the terms of the policy the agents are prohibited from altering or discharging contracts or waiving forfeitures. This objection we do not deem tenable. The question in cases of this kind is not what power did the agent in fact possess, but what power did the company hold him out to the public as possessing. * * * It is immaterial what may have been said in the policy in regard to the payment of the premium. It was within the power of the company, acting through its agents, to change entirely the mode of or dispense with the payments as provided by the policy and adopt a different mode and time of payment.'

At page 292, the court said:

61-10879-100

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THE UNITED STATES DEPARTMENT OF THE INTERIOR

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THE UNIVERSITY OF CHICAGO

16. The following are the names of the persons who have been appointed as members of the Board of Directors of the Corporation:

1960

1990-1991

1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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1. The first step in the process of identifying a problem is to determine the nature of the problem. This involves a thorough understanding of the situation and the factors that are contributing to the problem. Once the nature of the problem is understood, the next step is to identify the causes of the problem. This involves a detailed analysis of the situation and the factors that are contributing to the problem. Once the causes of the problem are identified, the next step is to develop a plan of action. This involves determining the steps that need to be taken to solve the problem. Once a plan of action is developed, the next step is to implement the plan. This involves carrying out the steps that have been determined in the plan of action. Finally, the last step in the process is to evaluate the results of the plan. This involves determining whether the plan has been successful in solving the problem and whether any further action is needed.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 08-04-2010 BY 60322 UCBAW

THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION
PUBLISHED WEEKLY

10. The following information is for your information only. It is not to be used for any other purpose.

"Mechem on Agency says (sec. 931, div. 1): 'The insurance agent, as thus distinguished from the broker, is ordinarily held to be a general agent of the company. As such general agent it is held that he may waive forfeitures and conditions in the policy, notwithstanding a provision therein that no agent has such power; that he may waive pre-payment of the premium although the policy provides that it shall not take effect until the premium is paid.' May on Insurance (vol. 2, sec. 360b) says: 'An agent authorized to take and approve risks and to insure may allow credit. A general agent may waive the condition as to the payment of the first premium and give credit, even though the policy declares that the contract cannot be modified except by writing signed by the president or secretary.'"

To the same effect are Mousette v. Monarch Life Ins. Co., 309 Ill. App. 224, 32 N. E. 2d 1004, 1007; Beddow v. Hicks, 303 Ill. App. 247, 25 N. E. 2d 93, 97; and Colky v. Metropolitan Life Ins. Co., 320 Ill. App. 120.

It is next contended that if Agent Cerven had notice or knowledge with reference to the serious illness or confinement prior to the application of the insured, the illness or confinement of Wladyslaw Rakowski in the hospital prior to the application for the issuance of the policies in question would not or could not be notice to the defendant.

There is evidence in the record, though Cerven denied it, that Cerven had knowledge of the fact that the insured had been an inmate of a hospital within two years prior to the issuance of the policies. On this disputed question of fact the trial court found in favor of the plaintiff, and we cannot hold that the trial court erred in so doing.

There is evidence in the record that the insured could not read or write; that Cerven, the agent of the defendant who took the applications, filled out answers therein in his own handwriting; that instead of putting down the answers as given by the applicant he undertook, without the knowledge of the applicant, to insert therein untruthful answers. Cerven, being the agent of the defendant, thus undertook to insert his own conclusions in the applications. There can be no question that if the agent undertook to insert his own conclusions which were different from the answers given by the

insured, or, if Agent Cerven at the time the application for insurance was made, had notice and knowledge of the facts material to the risk, said notice would be notice to the defendant and would prevent it from insisting upon a forfeiture. The court said in the case of Niemann v. Security Benefit Ass'n. 350 Ill. 308, at page 316:

"The evidence for appellee tended to show that DeBow, at the time he delivered the certificate, knew she was not in good health. There is ample proof in the record that the condition of the policy that it should not go into effect until delivered to and signed by the insured while in good health was waived by appellant, and the court did not err in denying the motion for an instructed verdict on that ground."

In the case of New York Life Insurance Co. v. Chapman, 132 Fed. 688, at page 693, the court said:

"Notice to an agent of facts connected with the business which the agent is employed to do is notice to his principal. Knowledge acquired by an agent when he delivers a policy, with authority to make delivery, is knowledge of the company." (Cases cited.)

In the case of Phenix Insurance Company v. Hart, 149 Ill. 513, at page 522, the court said:

"The cases are not uniform throughout the country in respect of when notice to or knowledge of an agent, or representations by him, will bind the company. In this State, however, the decisions are uniform that notice to the agent, at the time of the application for the insurance, of facts material to the risk, is notice to the insurer, and will prevent it from insisting upon a forfeiture for causes within the knowledge of the agent. Atlantic Insurance Co. v. Wright, 22 Ill. 473; Farmers and Merchants Ins. Co. v. Chestnut, 60 Ill. 116; Commercial Ins. Co. v. Ives, 66 Ill. 402; Andes Ins. Co. v. Fish, 71 Ill. 620; St. Paul Fire and Marine Ins. Co. v. Wells, 89 Ill. 82; American Ins. Co. v. Luttrell, 89 Ill. 314; Union Ins. Co. v. Chipp, 93 Ill. 96; Germania Fire Ins. Co. v. McKee, 94 Ill. 494; Phenix Ins. Co. v. Stocks, 149 Ill. 513 at 319."

The court goes on further to say, at page 523:

"It is, however, insisted, that by the terms of the policy a waiver of its conditions could only be made by the general agent at Chicago, and that, therefore, waiver of the condition by the local agent would not be binding upon the company, and that appellee, having notice of the stipulation, could not have been misled to his prejudice by the conduct of Upham. That he was thus misled, if the company be now permitted to insist upon the non-endorsement of the consent to the Layman mortgage as a cause of forfeiture, does not, under the proof in this case, admit of question."

At page 524 the court says:

"The stipulation in the policy that the waiver could be made only by indorsement upon the policy by the general agent at Chicago was inserted for the benefit of the insurer, and, like any other clause or condition of the policy, might be waived by the company. As we have seen, notice to the agent of matters falling within the general scope of his apparent authority is notice to the principal, and the company may be estopped from asserting a forfeiture of the policy by the knowledge of its agent of facts which would justify it in declaring the forfeiture, which right it has failed to exercise, but instead has treated the policy as in force. Here, the agent of the company, and therefore the company, knew of the Layman mortgage."

In Weiskuth v. Supreme Tribe Ben Hur, 272 Ill. 541,

at 549 it is said:

"In passing upon a similar question in Provident Life Assurance Society v. Cannon, 201 Ill. 260, we said: 'Notice to the agent, at the time of the application for the insurance, of facts material to the risk is notice to the insurer, and will prevent it from insisting upon a forfeiture for causes within the knowledge of the agent. (Phenix Ins. Co. v. Hart, 149 Ill. 513; Home Ins. Co. v. Mendenhall, 164 Ill. 458.) Where the assured discloses facts to the agent and the agent undertakes to fill out the application, and instead of stating the facts as they are disclosed to him inserts in lieu thereof conclusions of his own, the insurance company will not be permitted to insist that the words of the agent, and not of the assured, are warranties, rendering the policy void. - Phenix Ins. Co. v. Stocks, 149 Ill. 319; Royal Neighbors of America v. Boman, 177 Ill. 27; Tettonia Life Ins. Co. v. Beck, 74 Ill. 165.'"

In the case of Colky v. Metropolitan Life Ins. Co. 320 Ill.

App. 120, this court, speaking through Justice Kiley, said at page 128:

"In Hancock Life Ins. Co. v. Schlink, 176 Ill. 284, an agent advertised as 'general agent', but to offset that fact he was prohibited in writing from waiving provisions, and the court held that since he had power to solicit, take applications, collect premiums and deliver policies, he had power to waive a condition therein. In Niemann v. Security Benefit Ass'n. 350 Ill. 308, it was held that notice to the agent of an insurer, at the time an application for insurance is made, of facts material to the risk is notice to the insurer which will prevent it from insisting upon a forfeiture because of such facts. The court there gave the Hancock case as authority for the statement that a general agent clothed with power to solicit insurance, receive and forward applications, receive and deliver policies and collect premiums has power to waive regardless of a provision in the policy which negatived that power. In the Hancock case, however, at page 290, the court did not use the term general agent, but simply agent. The same extension of the term used in the Hancock case is made in the Mousette case. (Mousette v. Monarch Life Ins. Co., 309 Ill. App. 224.) We believe the rule which applies in favor of a beneficiary, where conclusions of the agent were written on the application instead of the truthful answers of the insured (Weiskuth v. Supreme Tribe Ben Hur, 272 Ill. 541), should with greater force apply here where Mintz knew of Colky's condition; where the medical examiner should have detected that

condition; where the company should have seen the contradictions in the answers in the two policies and especially since the Galkys could not read or write English. The Hancock case appears to be the leading case on the subject of an agent's power to waive and under it we are of the opinion that Mintz was empowered to and did waive the pertinent provisions of the policy; that the court properly admitted the evidence tending to prove Mintz' knowledge and that plaintiff's instruction number 2 was properly given."

The record shows that the doctor who made the medical examination of the insured did not ask any questions of the insured at the time of the medical examination, and that the doctor did not make any inquiry of the insured when the insured was last sick or whether he had been in the hospital. From this testimony we can only conclude that the doctor filled out his report as medical examiner without asking any questions and, inasmuch as the insured could not read or write, the doctor must have filled out the answers made in his own handwriting without asking the questions to which the answers were given. The answers, therefore, were the conclusions of the medical examiner and not of the insured.

Under the above evidence the trial court was justified in finding that the defendant could not insist upon a forfeiture of the policies, and since the questions of fact herein were found by the court in favor of the plaintiff upon disputed questions of fact, we cannot say that the trial court erred in so holding. The judge who heard the evidence herein saw and heard the witnesses for both parties, and he was in a better position to judge of their credibility than we can be. This court under these circumstances cannot hold the trial court erred in entering the findings in favor of the plaintiffs.

For the reasons hereinabove given, the judgment of the Municipal Court is affirmed.

AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.

condition; where the answer is "no" in the answer to the question "could not read or write" the leading case on the subject is under it we are of the opinion that his wife the petitioner could not read or write. The evidence is that she could not read or write and that she could not read or write.

The court said:

Examination of the evidence in the case of the wife of the petitioner shows that she was unable to read or write and that she was unable to read or write. The evidence is that she was unable to read or write and that she was unable to read or write.

only woman in the family who could not read or write. The evidence is that she was unable to read or write and that she was unable to read or write. The evidence is that she was unable to read or write and that she was unable to read or write.

the answer was "no" in the answer to the question "could not read or write" the leading case on the subject is under it we are of the opinion that his wife the petitioner could not read or write. The evidence is that she was unable to read or write and that she was unable to read or write.

finding that the petitioner was unable to read or write. The evidence is that she was unable to read or write and that she was unable to read or write. The evidence is that she was unable to read or write and that she was unable to read or write. The evidence is that she was unable to read or write and that she was unable to read or write.

For the reasons hereinbefore stated, the judgment of the

Municipal Court is affirmed.

MURDER, R. J. AND ALICE, J. DUNN.

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JOHN A. DEMERATH,

Appellant,

v.

ARTHUR C. SCHENNUM,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

324 I.A. 584

MR. JUSTICE LUFF DELIVERED THE OPINION OF THE COURT.

This is an action for the recovery of rent for the month of May, 1942, amounting to \$100, claiming rent under a hold-over term following the expiration of a written lease between the parties, and further requested the court to fix reasonable attorney's fees in accordance with the provision of the lease attached to the statement of claim. Defendant filed his defense. Thereafter both plaintiff and defendant filed their respective motions, supported by affidavit, for a summary judgment, and upon hearing the court overruled plaintiff's motion, sustained defendant's motion for summary judgment, and entered judgment against the plaintiff and in favor of defendant, from which orders this appeal was prosecuted.

There is little, if any, dispute as to the material facts in the case. The pleadings disclose that defendant entered into a written lease with plaintiff for a period of one year from May 1, 1937 to April 30, 1938, at a rental of \$100 per month. Defendant remained in possession of the premises during the term of the lease, paid his rent regularly, and, thereafter, at the same rental, remained in the premises until April 30, 1942. Just prior to the expiration of the lease in the month of April, 1938, defendant desired to continue occupancy under a month to month arrangement with the privilege of moving at any time, to which

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plaintiff did not consent. This is clearly shown in the deposition of the defendant wherein he says that when he talked with plaintiff's authorized agent, he (agent) "never said that he would rent the store to me from month to month," and that when defendant advised the agent the understanding would be that he would be renting from month to month, he (agent) "shrugged his shoulders and went out. I (defendant), did not get any satisfaction from him at any time". When defendant said to the agent, "Well, I am privileged to move whenever I want to", the agent "shrugged his shoulders and walked out". He did not say "Yes" or "No."

Where a tenant under a lease for a year or years holds over after the expiration of the term of the lease, there being no new lease or agreement, the landlord may, at his election, treat the tenant as a trespasser and evict him, or, treat him as a tenant from year to year thereafter, upon the same terms as in the original lease, or (if these have been partly changed), upon the terms of the original lease as so modified. The holding over is presumed by law from the mere continued occupancy by a tenant of the premises, in the absence of proof of a new agreement between the parties as to such occupancy. The election to treat the tenant as a hold-over tenant is exclusively that of the landlord, and such a hold-over tenancy may conceivably exist even though contrary to the tenant's intention. No doubt defendant desired a change of the tenancy from year to year to one of month to month but his desire or intention alone would not be sufficient to change the term of the tenancy. (Clinton Wire Cloth Co. v. Gardner, 99 Ill. 151).

There being no new understanding or agreement between the parties pertaining to a change of the tenancy, the defendant remained a tenant from year to year. (Johnson v. Foreman, 40 Ill. App. 456; Hately v. Myers, 96 Ill. App. 217.)

It therefore follows that the presumption of holding over which arose from the continued occupancy of the premises prevails.

The record discloses that the hold-over tenancy would have expired on April 30, 1942, and that defendant sent by registered mail to plaintiff's duly authorized agent, in pursuance of section 5 of the Landlord and Tenant act, the following notice:

" 5929 West Division Street, Chicago, Ill.
February 26, 1942.

Mr. T. P. Oster
Dear Mr. Oster:

This is to notify you that I will vacate store occupied by me as drug store at 5929 West Division Street on or before April 30, 1942.

Respectfully,
A. C. Schennum. "

Chapter 80, section 5 of the Illinois Revised Statutes, 1941 (Landlord and Tenant), provides:

"NOTICE TO TERMINATE TENANCY FROM YEAR TO YEAR.] In all cases of tenancy from year to year, sixty days' notice in writing shall be sufficient to terminate the tenancy at the end of the year. The notice may be given at any time within four months preceding the last sixty days of the year."

There can be no question from the pleadings that the notice was sent within the time prescribed by statute, and it is admitted by plaintiff that he received the same through his duly authorized agent. Plaintiff contends, first, that the notice was not sufficient in substance and in form and was not in compliance with section 5 of the act; and, second, that the notice was not served in the manner required by law.

Upon an examination of the notice we find that it simply informed the plaintiff that the defendant would vacate the premises on or before April 30, 1942, and says nothing in reference to terminating the tenancy. It only conveyed the information to the landlord that the tenant intended to vacate. This notice did not terminate the tenancy, and in the event the landlord had re-rented the premises, it would not protect the landlord from liability to the tenant in damages should the tenant have taken the position that he did not intend to terminate the tenancy.

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

101-102-103-104-105-106-107-108-109-110-111-112-113-114-115-116-117-118-119-120-121-122-123-124-125-126-127-128-129-130-131-132-133-134-135-136-137-138-139-140-141-142-143-144-145-146-147-148-149-150-151-152-153-154-155-156-157-158-159-160-161-162-163-164-165-166-167-168-169-170-171-172-173-174-175-176-177-178-179-180-181-182-183-184-185-186-187-188-189-190-191-192-193-194-195-196-197-198-199-200-201-202-203-204-205-206-207-208-209-210-211-212-213-214-215-216-217-218-219-220-221-222-223-224-225-226-227-228-229-230-231-232-233-234-235-236-237-238-239-240-241-242-243-244-245-246-247-248-249-250-251-252-253-254-255-256-257-258-259-260-261-262-263-264-265-266-267-268-269-270-271-272-273-274-275-276-277-278-279-280-281-282-283-284-285-286-287-288-289-290-291-292-293-294-295-296-297-298-299-300-301-302-303-304-305-306-307-308-309-310-311-312-313-314-315-316-317-318-319-320-321-322-323-324-325-326-327-328-329-330-331-332-333-334-335-336-337-338-339-340-341-342-343-344-345-346-347-348-349-350-351-352-353-354-355-356-357-358-359-360-361-362-363-364-365-366-367-368-369-370-371-372-373-374-375-376-377-378-379-380-381-382-383-384-385-386-387-388-389-390-391-392-393-394-395-396-397-398-399-400-401-402-403-404-405-406-407-408-409-410-411-412-413-414-415-416-417-418-419-420-421-422-423-424-425-426-427-428-429-430-431-432-433-434-435-436-437-438-439-440-441-442-443-444-445-446-447-448-449-450-451-452-453-454-455-456-457-458-459-460-461-462-463-464-465-466-467-468-469-470-471-472-473-474-475-476-477-478-479-480-481-482-483-484-485-486-487-488-489-490-491-492-493-494-495-496-497-498-499-500-501-502-503-504-505-506-507-508-509-510-511-512-513-514-515-516-517-518-519-520-521-522-523-524-525-526-527-528-529-530-531-532-533-534-535-536-537-538-539-540-541-542-543-544-545-546-547-548-549-550-551-552-553-554-555-556-557-558-559-560-561-562-563-564-565-566-567-568-569-570-571-572-573-574-575-576-577-578-579-580-581-582-583-584-585-586-587-588-589-590-591-592-593-594-595-596-597-598-599-600-601-602-603-604-605-606-607-608-609-610-611-612-613-614-615-616-617-618-619-620-621-622-623-624-625-626-627-628-629-630-631-632-633-634-635-636-637-638-639-640-641-642-643-644-645-646-647-648-649-650-651-652-653-654-655-656-657-658-659-660-661-662-663-664-665-666-667-668-669-670-671-672-673-674-675-676-677-678-679-680-681-682-683-684-685-686-687-688-689-690-691-692-693-694-695-696-697-698-699-700-701-702-703-704-705-706-707-708-709-710-711-712-713-714-715-716-717-718-719-720-721-722-723-724-725-726-727-728-729-730-731-732-733-734-735-736-737-738-739-740-741-742-743-744-745-746-747-748-749-750-751-752-753-754-755-756-757-758-759-760-761-762-763-764-765-766-767-768-769-770-771-772-773-774-775-776-777-778-779-780-781-782-783-784-785-786-787-788-789-790-791-792-793-794-795-796-797-798-799-800-801-802-803-804-805-806-807-808-809-810-811-812-813-814-815-816-817-818-819-820-821-822-823-824-825-826-827-828-829-830-831-832-833-834-835-836-837-838-839-840-841-842-843-844-845-846-847-848-849-850-851-852-853-854-855-856-857-858-859-860-861-862-863-864-865-866-867-868-869-870-871-872-873-874-875-876-877-878-879-880-881-882-883-884-885-886-887-888-889-890-891-892-893-894-895-896-897-898-899-900-901-902-903-904-905-906-907-908-909-910-911-912-913-914-915-916-917-918-919-920-921-922-923-924-925-926-927-928-929-930-931-932-933-934-935-936-937-938-939-940-941-942-943-944-945-946-947-948-949-950-951-952-953-954-955-956-957-958-959-960-961-962-963-964-965-966-967-968-969-970-971-972-973-974-975-976-977-978-979-980-981-982-983-984-985-986-987-988-989-990-991-992-993-994-995-996-997-998-999-1000-1001-1002-1003-1004-1005-1006-1007-1008-1009-1010-1011-1012-1013-1014-1015-1016-1017-1018-1019-1020-1021-1022-1023-1024-1025-1026-1027-1028-1029-1030-1031-1032-1033-1034-1035-1036-1037-1038-1039-1040-1041-1042-1043-1044-1045-1046-1047-1048-1049-1050-1051-1052-1053-1054-1055-1056-1057-1058-1059-1060-1061-1062-1063-1064-1065-1066-1067-1068-1069-1070-1071-1072-1073-1074-1075-1076-1077-1078-1079-1080-1081-1082-1083-1084-1085-1086-1087-1088-1089-1090-1091-1092-1093-1094-1095-1096-1097-1098-109

risale a tutti gli atti di gestione dell'ente, in particolare:

Journal of Management Studies, 19(1), 67-80.

Revised 10/1/84

Figure 1. The effect of the concentration of the solution on the adsorption of the dye. The concentration of the solution was 0.01, 0.02, 0.03, 0.04, 0.05, 0.06, 0.07, 0.08, 0.09, 0.1, 0.2, 0.3, 0.4, 0.5, 0.6, 0.7, 0.8, 0.9, 1.0, 1.5, 2.0, 3.0, 4.0, 5.0, 6.0, 7.0, 8.0, 9.0, 10.0, 15.0, 20.0, 30.0, 40.0, 50.0, 60.0, 70.0, 80.0, 90.0, 100.0, 150.0, 200.0, 300.0, 400.0, 500.0, 600.0, 700.0, 800.0, 900.0, 1000.0, 1500.0, 2000.0, 3000.0, 4000.0, 5000.0, 6000.0, 7000.0, 8000.0, 9000.0, 10000.0, 15000.0, 20000.0, 30000.0, 40000.0, 50000.0, 60000.0, 70000.0, 80000.0, 90000.0, 100000.0, 150000.0, 200000.0, 300000.0, 400000.0, 500000.0, 600000.0, 700000.0, 800000.0, 900000.0, 1000000.0, 1500000.0, 2000000.0, 3000000.0, 4000000.0, 5000000.0, 6000000.0, 7000000.0, 8000000.0, 9000000.0, 10000000.0, 15000000.0, 20000000.0, 30000000.0, 40000000.0, 50000000.0, 60000000.0, 70000000.0, 80000000.0, 90000000.0, 100000000.0, 150000000.0, 200000000.0, 300000000.0, 400000000.0, 500000000.0, 600000000.0, 700000000.0, 800000000.0, 900000000.0, 1000000000.0, 1500000000.0, 2000000000.0, 3000000000.0, 4000000000.0, 5000000000.0, 6000000000.0, 7000000000.0, 8000000000.0, 9000000000.0, 10000000000.0, 15000000000.0, 20000000000.0, 30000000000.0, 40000000000.0, 50000000000.0, 60000000000.0, 70000000000.0, 80000000000.0, 90000000000.0, 100000000000.0, 150000000000.0, 200000000000.0, 300000000000.0, 400000000000.0, 500000000000.0, 600000000000.0, 700000000000.0, 800000000000.0, 900000000000.0, 1000000000000.0, 1500000000000.0, 2000000000000.0, 3000000000000.0, 4000000000000.0, 5000000000000.0, 6000000000000.0, 7000000000000.0, 8000000000000.0, 9000000000000.0, 10000000000000.0, 15000000000000.0, 20000000000000.0, 30000000000000.0, 40000000000000.0, 50000000000000.0, 60000000000000.0, 70000000000000.0, 80000000000000.0, 90000000000000.0, 100000000000000.0, 150000000000000.0, 200000000000000.0, 300000000000000.0, 400000000000000.0, 500000000000000.0, 600000000000000.0, 700000000000000.0, 800000000000000.0, 900000000000000.0, 1000000000000000.0, 1500000000000000.0, 2000000000000000.0, 3000000000000000.0, 4000000000000000.0, 5000000000000000.0, 6000000000000000.0, 7000000000000000.0, 8000000000000000.0, 9000000000000000.0, 10000000000000000.0, 15000000000000000.0, 20000000000000000.0, 30000000000000000.0, 40000000000000000.0, 50000000000000000.0, 60000000000000000.0, 70000000000000000.0, 80000000000000000.0, 90000000000000000.0, 100000000000000000.0, 150000000000000000.0, 200000000000000000.0, 300000000000000000.0, 400000000000000000.0, 500000000000000000.0, 600000000000000000.0, 700000000000000000.0, 800000000000000000.0, 900000000000000000.0, 1000000000000000000.0, 1500000000000000000.0, 2000000000000000000.0, 3000000000000000000.0, 4000000000000000000.0, 5000000000000000000.0, 6000000000000000000.0, 7000000000000000000.0, 8000000000000000000.0, 9000000000000000000.0, 10000000000000000000.0, 15000000000000000000.0, 20000000000000000000.0, 30000000000000000000.0, 40000000000000000000.0, 50000000000000000000.0, 60000000000000000000.0, 70000000000000000000.0, 80000000000000000000.0, 90000000000000000000.0, 100000000000000000000.0, 150000000000000000000.0, 200000000000000000000.0, 300000000000000000000.0, 400000000000000000000.0, 500000000000000000000.0, 600000000000000000000.0, 700000000000000000000.0, 800000000000000000000.0, 900000000000000000000.0, 1000000000000000000000.0, 1500000000000000000000.0, 2000000000000000000000.0, 3000000000000000000000.0, 4000000000000000000000.0, 5000000000000000000000.0, 6000000000000000000000.0, 7000000000000000000000.0, 8000000000000000000000.0, 9000000000000000000000.0, 10000000000000000000000.0, 15000000000000000000000.0, 20000000000000000000000.0, 30000000000000000000000.0, 40000000000000000000000.0, 50000000000000000000000.0, 60000000000000000000000.0, 70000000000000000000000.0, 80000000000000000000000.0, 90000000000000000000000.0, 100000000000000000000000.0, 150000000000000000000000.0, 200000000000000000000000.0, 300000000000000000000000.0, 400000000000000000000000.0, 500000000000000000000000.0, 600000000000000000000000.0, 700000000000000000000000.0, 800000000000000000000000.0, 900000000000000000000000.0, 10000000

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02 JUL 86 09Z : VALLIANT WASH DC 7-10-86

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

第14 卷第4 期 2000 年12 月 第100 页

To effect the termination of a lease or a tenancy the notice must be so certain that it cannot be reasonably misunderstood. (32 Am. Jur., sec. 995, p. 837.) The notice to quit is technical and is well understood. It fixes the time at which a tenant is bound to quit, and the landlord has the right to enter at a time at which the rent terminates. The rights of both parties are fixed by it and are dependent upon it. The tenancy is "determined" by such notice properly given by either party. (Currier v. Barker, 2 Gray (Mass.) cited with approval in Arbenz v. Kiley, 57 S. Va. 580.) The tenant's liability for rent continues until he puts an end to the estate by proper notice, whether he continues to occupy the premises or not. (1 Washburn, Real Property, sec. 807.)

Therefore the notice was insufficient in substance, and did not comply with section 5 of the Landlord and Tenant act, as it failed to inform plaintiff of defendant's intention to terminate the tenancy. Holding, as we do, that the notice was not in compliance with the act, it therefore becomes unnecessary to consider the question of service.

For the reasons hereinabove given, we feel that the court erred in its refusal to grant plaintiff's motion for a judgment against the defendant.

The judgment is reversed and the cause remanded to the trial court with directions to enter judgment in favor of the plaintiff and against the defendant for the rent for the month of May, 1942, in the sum of \$100 and to determine the question of reasonable attorney's fees to be allowed to plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

BURKE, P.J. AND KILEY, J. CONCUR.

In effect the defendant...

notice must be given...

(32 Am. Jur., sec. 97, et seq.)

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The court's ruling...

the court...

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DURKE, J. J. AND...

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42922

IN THE MATTER OF THE ESTATE OF
LUCIAN E. WILLIAMS, Deceased,

PHILIP S. ALLEN, Executor of the
Will of LUCIAN E. WILLIAMS, Deceased,
THOMAS HART FISHER, and NORMAN
CRAWFORD,

Appellants,

v.

LUCILE S. WILLIAMS, CHESTER S. WILLIAMS
and LUCIAN MARSHALL WILLIAMS,

Respondents - Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

324 A. 384²

MR. JUSTICE LUPE DELIVERED THE OPINION OF THE COURT.

After hearing the heirs and legatees under the will of Lucian E. Williams, Deceased, the Probate Court found the estate had been fully administered as to all assets collected and inventoried by the executor, within nine months after issuance of letters. Fees for the executor and his attorneys were fixed, disbursements of the funds in the hands of the executor was ordered, and the executor was discharged. On appeal to the Circuit Court, the order of the Probate Court was affirmed, and this appeal followed.

The last will and testament of deceased was filed in the Probate Court of Cook County on January 26, 1941, and Philip S. Allen was duly appointed executor thereof. On April 23, 1941 an inventory of all the real and personal property of said estate was filed, and approved on April 24, 1941. On the petition of the executor an order was entered ex parte on November 26, 1941, giving leave to the executor to institute suit in the Circuit Court of Cook County against the beneficiaries under the will of Lucian E. Williams, the Chicago Title and Trust Company, and others, to construe the will of John M. Williams, who was the grandfather of the decedent,

IN THE ESTATE OF THE LATE
LUCIAN M. WILLIAMS, deceased,

WILLIAM S. ALLEN, executor of the
will of LUCIAN M. WILLIAMS, deceased,
THOMAS HARRIS, JR., executor,
CHICAGO, ILLINOIS.

Agreement,

7.

LUCIAN M. WILLIAMS, deceased,
and LUCIAN WILLIAMS, executor,
Representatives - Executors.

It is hereby agreed that the estate of the late
Lucian M. Williams, deceased, as hereinbefore set forth, the estate
has been fully administered and all debts collected and paid
by the executor, and all other matters of the estate of the late
for the executor, the said Lucian Williams, deceased, and the executor
funds in the hands of the executor are hereby, and the executor
was distributed, to the said Thomas Harris, Jr., executor of the
Probate Court and the said William S. Allen, executor.

The first will and testament of the late Lucian M. Williams, deceased, was filed in the
Probate Court of Cook County on January 11, 1911, and will be
Allen was duly appointed executor thereof, on April 11, 1911, and
inventory of all the real and personal property of said estate was
filed, and approved on April 11, 1911. On the 11th day of the executor
an order was entered in said Probate Court, giving leave to
the executor to institute suit in the Circuit Court of Cook County
against the beneficiaries under the will of Lucian M. Williams,
the Chicago Title and Trust Company, and others, to enforce the
will of John M. Williams, who was the grandfather of the deceased.

and for discovery and an accounting of the moneys due therefrom to the decedent's estate. A complaint was filed, in pursuance to said order, in the Circuit Court of Cook County. The record indicates that this was against the wishes of the beneficiaries under the will of Lucian E. Williams, deceased, and they, by their attorneys, filed motions to strike the complaint and to dismiss the suit. On January 5, 1942, on petition of Chester S. Williams, one of the beneficiaries under the will of Lucian E. Williams, an order was entered in the Probate Court vacating the order of November 26, 1941 which authorized the construction and accounting suit. On June 9, 1942, in the Circuit Court proceedings, on motion of defendants, the complaint was dismissed and leave was granted to the executor to file an amended complaint. The amended complaint was never filed and on March 22, 1943 the Circuit Court, on motion of defendants, dismissed the cause at plaintiff's costs.

The record discloses that the executor commenced ancillary administration proceedings in the State of Minnesota for the purpose of administering the 1/70th undivided interest owned by decedent in the Biwabik mine located in the State of Minnesota, and, in addition thereto, it was alleged in his complaint that decedent owned an interest in certain so-called timberlands in Minnesota. Allen was appointed as ancillary administrator in Minnesota. Objections were filed to his appointment, by Chester S. Williams. The objections were overruled, and from the order overruling the objections an appeal was taken to the District Court of the State of Minnesota. The District Court, on March 10, 1943, entered its order removing Allen as executor of the Estate of Lucian Edward Williams, deceased, in the State of Minnesota. From this order an appeal was taken by the executor, to the Supreme Court of Minnesota, where on March 17, 1944, the order was affirmed.

On June 30, 1942, the beneficiaries filed their petition in the Probate Court of Cook County alleging therein that all claims against the estate were settled and satisfied, except Federal Estate and Illinois Inheritance taxes and the unpaid costs of administration. It was further alleged that the beneficiaries were willing to become responsible for the payment of such taxes and requested that an order be entered upon the executor to file his final account and report. On the same day, the court entered an order wherein it recited that the claims of the Collector of Internal Revenue had been paid, that the assignees of all other claims had consented to the satisfaction of such claims, and that the claims had been satisfied of record; that the two beneficiaries under the will of Lucian E. Williams, other than the residuary legatees, had filed appearances and waived notice of the hearing upon the final account of the executor, and that the residuary legatees had caused a deposit to be made of an amount believed to be sufficient for the payment of Illinois Inheritance taxes; that more than sixteen months had elapsed since the issuance of letters testamentary; and the order directed Allen, as executor, to file his final account and report within thirty days from the date of the order. On August 5, 1942, the executor filed a "first current account and report" instead of a final account and report as directed by the court on June 30, 1942. Beneficiaries filed objections and answers to the account and report. The matter came on for hearing and on November 27, 1942, the Probate Court entered an order wherein it found that the executor had collected all of the personal property listed in the inventory which had been filed within nine months after the issuance of the letters; and that all claims filed in said estate prior to the expiration of nine months after the issuance of letters testamentary had been allowed and said claims

were satisfied of record; that the sum of \$2150 had been deposited with the County Treasurer of Cook County, Illinois, as a deposit to apply in payment of the inheritance tax. The order directed that the account and report styled "first account and report", filed by the executor on August 5, 1942, stand as a final account and report, and it further found that the real and personal estate of Lucian E. Williams, deceased, had been fully administered. It then directed the payment of certain costs and expenses of administration and fixed the fees of the executor and his attorneys and directed the payment thereof. It directed the executor to pay the balance of moneys in his hands to the Collector of Internal Revenue at Chicago to be applied on account of the Federal Estate tax. It then concluded that the executor make the payments as hereinabove set forth, file his vouchers and receipts for the same within ten days from the date of the order, and, upon the filing of vouchers and receipts, the executor be discharged and the estate be declared fully settled and closed. From this order the executor and his attorneys prayed an appeal to the Circuit Court of Cook County.

The Circuit Court after a full hearing entered its order on June 23, 1943, wherein it made substantially the same findings as were recited in the order of the Probate Court of November 27, 1942.

The executor claims that the estate should not have been closed because the Illinois Inheritance taxes had not been determined and paid; that the Federal Estate taxes were still to be determined and paid; that there were certain ancillary proceedings necessary in Minnesota; and that it was necessary to determine, adjudicate and pay and otherwise dispose of certain claims filed subsequent to the expiration of the nine months' period; and that it was necessary to determine and pay the costs of administration, including the executor's fees and fees of his attorneys.

were satisfied of record; that the sum of \$100 had been deposited with the County Treasurer of Cook County, Illinois, as a deposit to apply in payment of the inheritance tax. The order directed that the account and report titled "first account and report", filed by the executor on August 5, 1942, stand as a final account and report, and it further found that the test and personal estate of William E. Williams, deceased, had been fully administered. It then directed the payment of certain debts and expenses of administration and fixed the fees of the executor and his attorneys and directed the payment thereof. It directed the executor to pay the balance of moneys in his hands to the Collector of Internal Revenue at Chicago to be applied on account of the Federal estate tax. It then concluded that the executor held the payments as hereinabove set forth, the his vouchers and receipts for the same within ten days from the date of the order, and upon the filing of vouchers and receipts, the executor be discharged and the estate be declared fully settled and closed. From this order the executor and his attorneys prayed an appeal to the Circuit Court of Cook County.

The Circuit Court after a full hearing entered its order on June 26, 1942, wherein it made substantially the same findings as were recited in the order of the Probate Court of November 27, 1942. The executor claims that the estate should not have been closed because the Illinois inheritance taxes had not been determined and paid; that the Federal estate taxes were still to be determined and paid; that there were certain auxiliary proceedings necessary in Minnesota; and that it was necessary to determine, adjudge and pay and otherwise dispose of certain claims filed subsequent to the expiration of the nine months' period; and that it was necessary to determine and pay the costs of administration, including the executor's fees and fees of his attorneys.

Upon hearing in the Circuit Court it was shown that the beneficiaries under the will of the decedent with their own funds had paid all claims against the estate except the Illinois Inheritance tax and Federal Estate tax; that a deposit had been made by the beneficiaries with the County Treasurer to cover the Illinois Inheritance tax, and the executor was directed to apply the balance of the money in his hands, after payment of expenses of administration, toward the payment of the Federal Estate tax; that payment of the balance of the Federal Estate tax was provided for through the assets of the Lucile S. Williams trust.

The executor and his attorneys claimed fees in the Probate and Circuit Courts. Both courts allowed the executor \$219.21 for his fees, and allowed to the executor for the payment to his attorneys Thomas H. Fisher and Norman Crawford the sum of \$219.21.

We have examined the evidence taken on the hearing in the Circuit Court, together with the documents and exhibits which were admitted in evidence, and from such examination find that the Illinois Inheritance tax had been satisfactorily taken care of by the beneficiaries under the will, from their personal funds; that they had deposited the sum of \$2150 with the County Treasurer for the payment of the same; that likewise the Federal Estate tax can be collected from the assets which are not subject to administration by the executor in this estate, and the balance in the hands of the executor after the payment of costs, etc., was ordered to be paid toward the payment of said Federal Estate tax.

Since oral argument, additional authorities have been submitted and a response was filed thereto by appellants, wherein appellants contended that no protection is afforded to Allen, the

Upon hearing in the circuit court of the fact that the beneficiaries under the will of the decedent had their own funds

and paid all taxes against the estate, the Illinois

Inheritance Tax and Federal Estate Tax; that a decree was made by the beneficiaries and the court in favor of the

Illinois Inheritance Tax, and the Federal Estate Tax, to apply

the balance of the estate in this regard, the payment of expenses

of administration, costs of litigation, and Federal Estate Tax;

that payment of the balance of the estate was provided

for through the agency of the Illinois Trust.

The executor of the estate elected to have the proceeds

and Circuit Court. The amount of the proceeds was \$119,31.75

his fees, and allowed to the executor for his payment to his

attorneys Thomas W. Allen and Thomas W. Allen the sum of \$119.31.

He has examined the accounts and the books in the

Circuit Court, together with the accounts and exhibits which were

admitted in evidence, and from such examination find that the Illinois

Inheritance Tax has been satisfactorily paid out of the beneficiaries

under the will. From this account found that they had deposited

the sum of \$119.31 with the County Treasurer for the payment of the

same; that likewise the Federal Estate Tax had been collected from the

assets which are not subject to administration of the executor in

this estate, and the balance in the hands of the executor after the

payment of costs, etc., was returned to him and toward the payment

of said Federal Estate Tax.

Since oral argument, additional authorities have been

submitted and a response was filed thereto by respondents, wherein

respondents contended that no objection is allowed to Allen, the

executor, against his personal liability for the payment of the Federal taxes when finally assessed. The order appealed from directed the distribution of the balance remaining in the hands of the executor, after payment of expenses of administration, to the Collector of Internal Revenue to apply on the Federal Estate tax. In addition thereto, there are ample assets in the Lucile S. Williams trust which, by the provisions of the Federal Reserve law, are subject to a lien for the unpaid Federal Estate taxes or the balance thereof which may be due after deduction of the payment of the amount in the hands of the executor as was ordered by the court. (Sec. 811 (c) and 827 (a), Title 26, U. S. C. A.) It necessarily follows that there would be no personal liability to Allen in respect of the said Federal Estate tax.

It is strenuously contended by counsel for appellant that because the executor had instituted ancillary proceedings in the State of Minnesota the domiciliary administration should not be closed until the ancillary proceedings were terminated. With this contention we cannot agree. The only interest of the decedent in Minnesota was an undivided 1/70th interest in the Biwabik Mine, which was an interest in real estate. The executor had no right or title in or to the decedent's real estate in the State of Minnesota or the income therefrom. (In Re Estate of Baker, 316 Ill. App. 366; Pech v. Landphere, 238 Ill. App. 557.) This rule is not only the rule in Illinois but in Minnesota as well. (In Re Hencke's Estate, 212 Minn. 407, 4 N. W. (2d) 353). The rule that it is the duty of the ancillary executor to turn over the balance in his hands, after paying all claims in his jurisdiction, to the domiciliary executor, applies only to personal property or to proceeds of the sale thereof. (Kelly v. Dyer, 359 Ill. 46.) An executor has no right or title in

executor, against his personal liability for the payment of the Federal taxes when finally assessed. The executor is not to be directed the distribution of the balance remaining in the hands of the executor, after payment of expenses of administration, to the Collector of Internal Revenue to pay on the Federal estate tax. In addition thereto, there is no reason to believe that the estate is subject to a lien for the unpaid Federal estate tax on the balance thereof which may be due after settlement of the account of the executor in the hands of the executor or as a result of the audit. (Sec. 811 (c) and 812 (a), Title 26, U.S.C. It is accordingly follows that there would be no executor's liability to the estate in respect of the said Federal estate tax.

It is accordingly concluded by the court for the reasons that because the executor has been appointed and is acting in the State of Minnesota and exclusively administering the estate has been closed until the auxiliary proceeding was terminated. With this contention we cannot agree. The only question for decision in Minnesota was an undivided 1/32d interest in the estate which was an interest in real estate. The executor had no right or title in or to the decedent's real estate in the State of Minnesota or the income therefrom. (See Wright v. Wright, 215 Ill. App. 3d, 302; Pach v. Langsdorf, 238 Ill. App. 3d, 337.) This rule is not only the rule in Illinois but in Minnesota as well. (See Wright v. Wright, 215 Ill. App. 3d, 302, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

(Kelly v. Byrd, 232 Ill. 48.) An executor has no right or title in realties only to personal property or to proceeds of the sale thereof, paying all claims in his jurisdiction, to the beneficiary executor, the auxiliary executor is turn over the balance to his hands, after

or to decedent's real estate or the income therefrom except a power to subject it to sale for the payment of debts in the manner provided by statute. (Alward v. Borah, 381 Ill. 134, and cases cited.) There is no evidence in the record which showed that the estate of Lucian E. Williams had any interest in the corpus of the Lucile S. Williams trust. Robert L. Burch, who was called as a witness on behalf of the executor, and whose testimony was not challenged, testified that he was assistant trust officer of the Chicago Title and Trust Company; that the trust created by the will of John M. Williams, grandfather of the decedent Lucian E. Williams, was assigned to him for administration and that he had administered that trust and had been responsible for it; that he was familiar with the Bivabik mine in Minnesota and the income therefrom, and that prior to his death Lucian E. Williams was the recipient of substantial income from the two sources above mentioned, which passed through the Chicago Title and Trust Company as trustee under the John M. Williams will. The witness then stated that Lucian E. Williams received approximately \$6500 a year as follows: \$3000 from the Chicago Title and Trust Company as trustee under the will of John M. Williams, and \$3500 a year from the Minnesota mine. The court then asked this question of Witness Burch: "Did the decedent have any income from these two sources due him at the time of his death?" to which the witness answered, "No, sir." Mr. Fisher, one of the appellants, then asked the witness: "You mean undistributed income put up in your hands or the hands of Mr. Pettibone at the time of the decedent's death? Wasn't there?" The witness answered, "No."

This evidence clearly indicates that there was no accumulated income from the trust due Lucian E. Williams upon the date of his death. It therefore necessarily follows that there was no personal estate to be administered in the State of Minnesota. The ancillary proceedings by the executor as to the fractional interest in the real estate located in Minnesota were unnecessary and futile.

er to decedent's real estate or the income therefrom except a power to subject it to sale for the payment of debts in the manner provided by statute. (A/Verd v. Estate, 201 Ill. 2d, 727, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

As to counsel's contention that the estate cannot be closed as it would be necessary to determine and adjudicate and pay or otherwise dispose of claims filed after the expiration of the nine-months' period in which claims should be filed before the estate is closed, we must disagree. The estate could be closed irrespective of claims that were filed subsequent to the expiration of the nine-months' period, as such creditors of the estate can only be considered as to assets which might be inventoried after the expiration of said nine-months' period, and the record fails to disclose any assets of the decedent to be subsequently administered. (Durflinger v. Arnold, 329 Ill. 93; Horner, Probate Practice and Estates (Cons. 4th ed., Vol. 1, sec. 419, p. 444); Ill. Rev. State. 1943, ch. 3, sec. 323 and ch. 3, sec. 356.)

As the order appealed from provided for the payment of costs of administration with executor's fees and fees of his attorney, there was no legal necessity that there be any further administration of the estate, and the trial court was correct in holding that the estate was properly closed by the order of the Probate Court. The executor and his attorneys complain of the fact that they were allowed no more than \$219.21 each. The personal property of this estate which came to the hands of the executor amounted to \$3653.43, and he also received a few articles of personalty upon which no value was placed in the inventory. A considerable number of hours of service was rendered by the executor and his attorney, but much of this service seems to have resulted in no advantage to the estate, and much of it the record indicates was futile. Under these circumstances we must take into consideration the amount of the personal estate, which is the only property which the executor and his attorneys really administered. The record shows the sum of \$300 was paid to the attorneys who represented the executor prior to his representation by his present lawyers. Such payment, together with the sums allowed

to the executor and his present attorneys totals \$738.42. Attorneys cannot embark upon speculative lawsuits for an estate and then expect to be paid for such services when such suits are determined to be unfounded and without merit. In a proceeding pending in the Probate Court attorney's fees should be allowed commensurate with the actual services rendered which were necessary to an orderly and prompt closing of the estate and the protection of its assets. Services which are not rendered in accordance with these principles should not be considered in fixing the fees to be allowed. Full consideration should be given to the size of the estate and the services rendered which were actually necessary with reference to the proper handling of the estate. The amount involved in this estate being only \$3653.43, we cannot say that the \$738.42 allowed to the executor and his attorneys for handling the estate is too low. The record indicates that all the inventoried assets that were collectible having been collected by the executor, and the distribution of all those assets having been provided for by the order of the Circuit Court, there was nothing more remaining to be done. Therefore, the court's order in declaring the estate to be closed was a proper one.

Appellants contend that the intervention by the beneficiaries in the Probate Court of Cook County was irregular and that they became liable as executors de son tort. It is true that they made no attempt to remove the executor as was done in the ancillary proceedings. The Probate Court having permitted their intervention with full knowledge, we cannot say he abused his discretion under the circumstances of this case. There is no merit in this contention. There are other points raised, but in view of our holding we deem it unnecessary to pass upon the same.

We consider that the evidence presented to the court amply justified it in affirming the order of the Probate Court closing the estate and fixing the fees at the sums above stated.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.

✓ 43260

3241A, 585

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

RIDGEWAY DRUG COMPANY, a corporation,

Plaintiff in Error.

ERROR TO

COUNTY COURT

COOK COUNTY.

MR. JUSTICE LUPE DELIVERED THE OPINION OF THE COURT.

Defendant Ridgeway Drug Company, a corporation, was charged with violation of section 2 of chapter 91 of an Act to Regulate the Practice of Pharmacy (Ill. Rev. Stats. 1941). Defendant waived a jury and entered a plea of not guilty. The cause was tried by the court, resulting in a finding of guilty. Motions for new trial and in arrest of judgment were denied and overruled and judgment entered on the finding, from which this cause comes here on a writ of error.

The information alleged that defendant on August 2, 1942, as owner and proprietor of a drug store and pharmacy, "unlawfully and knowingly allowed its employee one Virginia Stoyas, who was not then and there a registered pharmacist nor registered as an assistant pharmacist, nor a registered apprenticed pharmacist under the immediate supervision of a registered pharmacist * * * to dispense and sell at retail two one-ounce tins of rochelle salts (USP) and a box of twelve Bayer tablets of aspirin (USP) * * * in violation of chapter 91, section 2 of an act to regulate the practice of pharmacy."

Section 37(2), chap. 91, Ill. Rev. Stats. 1941, provides:

"That it shall be unlawful for the proprietor of any drug store or pharmacy to allow any person in his employ, except a registered pharmacist or registered assistant pharmacist, to compound, recommend, dispense, or sell at retail, drugs, medicines or poisons, or except an apprentice under the immediate supervision of a registered pharmacist as hereinafter provided."

THE PEOPLE OF THE STATE OF CALIFORNIA,

Defendants in Error,

v.

ALFRED J. BROWN, Plaintiff in Error.

Plaintiff in Error.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Defendants in Error,

changed with Alfred J. Brown, Plaintiff in Error.

Alfred J. Brown, Plaintiff in Error.

Defendant advised that he had been advised by Alfred J. Brown, Plaintiff in Error.

cause was taken to the Court of Appeals, where it was affirmed.

Notions for new trial, and for new trial, were denied.

overruled and for new trial, and for new trial, were denied.

cause came before the Court of Appeals, where it was affirmed.

The information was filed in the Court of Appeals, where it was affirmed.

as owner and proprietor of a drug store, and as a pharmacist, and as a

and knowingly sold and delivered to Alfred J. Brown, Plaintiff in Error, and

not then and there, and as a pharmacist, and as a pharmacist, and as a

assistant pharmacist, and as a pharmacist, and as a pharmacist, and as a

the immediate supervisor of a pharmacist, and as a pharmacist, and as a

dispense and sell of drugs and medicines, and as a pharmacist, and as a

(UCL) and a list of drugs and medicines, and as a pharmacist, and as a

in violation of section 37(3), and as a pharmacist, and as a

practice of pharmacy."

Section 37(3), and as a pharmacist, and as a pharmacist, and as a

"That it shall be unlawful for the proprietor of any drug store or pharmacy to allow any person in his employ, except a registered pharmacist or registered assistant pharmacist, to compound, recommend, dispense, or sell at retail, drugs, medicines or poisons, or except an apprentice under the immediate supervision of a registered pharmacist as hereinbefore provided."

It then provides a fine for violation thereof. It is urged on behalf of defendant that all sections of the act upon the same subject should be read and construed together, and argued that section 36(1) should be considered in determining and arriving at a true interpretation of the act in question in order to ascertain the object and purpose of the enactment. With this contention we agree. As was said in the case of Illinois Central R. R. Co. v. Chicago, B. & N. R. Co., 122 Ill. 473, at p. 481:

"The principle is well recognized that a statute should be construed in such a manner that all its parts will not only be consistent with each other, but that every provision thereof shall be given its proper effect, so that nothing in the act will appear to be superfluous or redundant."

In the ascertainment of the meaning of a statute, it is well to keep in view the rules of interpretation which should control. The intention must be sought in the words; and courts have no right to suppose that the legislature intended anything different than the natural import of the words used. When a statute needs construction, every part of it must be considered, so that the whole may harmonize; for it is never to be presumed that the legislature intended any portion to be without meaning. (Way v. Way, 64 Ill. 406.) The construction of a statute should be made of all parts together, and not solely by a particular clause or section thereof, in order to determine the object and purpose of the enactment, and should be so construed if possible that the whole enactment may stand and every part may have force and meaning. (Wright & Sons v. Cleveland, C. C. & St. L. Ry. Co., 169 Ill. App. 246.)

Section 36(1) of the act provides:

" * * * Nothing herein contained shall apply to or in any manner interfere with the practice of any physician or prevent him from supplying to his patients such articles as may seem to him proper, or with the exclusive wholesale business of any wholesale druggist, provided, further, that nothing contained in this act shall apply to the sale of patent or proprietary preparations and remedies which do not contain opium or coca leaves, or any compound, manufacture, salt, derivative or preparations thereof when sold in the original and unbroken packages only."

100-443887-100

Beneficial to health and life of the community

should be noted and reported accordingly. (See Section 30.1)

Should be corrected to: 10/10/10

[illegible]

1. The first part of the document is a list of names and addresses, which appears to be a directory or a list of contacts. The names are written in a cursive script, and the addresses are listed below them. The list includes names such as "J. H. Smith", "W. J. Jones", and "A. B. Brown", among others. The addresses are also written in cursive and include street names and city names.

10-10-1964

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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En , l'ordonnance n° 100 du 10 mai 1960 relative à la maintenance

On 10/17/01, I received a letter from the National Archives, 3rd Floor, JPM

SECRET

NOTE: See Part 1 for the names of the individuals who have been

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facture, salt, derivative or preparation thereof when sold in which do not contain oil or coal leaves, or any compound, resin- to the sale or export or proprietary protection and remedies provided, further, that nothing contained in this act shall apply or with the exclusive whole is contained in any package or package, supplying to his clients with articles of any kind to his power, interfere with the exercise of any obligation or prevent him from * * * * *

" * * * Selling herein constitutes itself as being intended to be made in connection with the purchase of any quantity or receipt of the product, or with the exclusive whole sale contract of any wholesale distributor, provided, further, that nothing contained in this act shall apply to the sale or lease or proprietary protection and restriction which do not contain either or both leaves, or any compound, manufacture, salt, derivative or preparation thereof when sold in the original and unbroken packages only."

" * * * Selling herein constitutes itself as being intended to be made in connection with the purchase of any quantity or receipt of the product, or with the exclusive whole sale contract of any wholesale distributor, provided, further, that nothing contained in this act shall apply to the sale or lease or proprietary protection and restriction which do not contain either or both leaves, or any compound, manufacture, salt, derivative or preparation thereof when sold in the original and unbroken packages only."

" * * * * * The original and unbroken packages only. " * * * * *

" * * * * * The original and unbroken packages only. " * * * * *

Upon carefully examining section 36 we find that it is permissible under the act for any person to sell a patent or proprietary preparation and remedy which does not contain opium or coca leaves or any compound, manufacture, salt, derivative or preparation thereof, when sold in original or unbroken packages.

That aspirin and rochelle salts do not contain opium or coca leaves and are neither compound, manufacture, salt, derivative or preparation thereof is a matter of common knowledge. Whether they are mentioned in any publication or not is of no import in this case. Bayer's aspirin is as much a proprietary product as Norton's salt. Proprietary medicines are described as those "prepared, put up and marked and ready for use by the public as soon as they leave the hands of the manufacturer. They are in packages or bottles, are labeled with the name, and are accompanied with wrappers containing directions for their use and the conditions for which they are claimed to be specifics." (People v. Moser, 176 Ill. App. 628.) There is no evidence in the record that People's exhibits 1, 2 and 3 contain "opium or coca leaves or any compound, manufacture, salt, derivative or preparation" of either opium or coca leaves, which are the drugs against which both the present and original statutes were directed.

An examination of the pharmacy act will show that it had in view two objects. One of these is to prohibit the compounding of medicine and the sale of the same as thus compounded, unless such compounding and sale shall be made by a registered pharmacist. The other object was to forbid the sale of patent or proprietary preparations and remedies which contain opium or coca leaves, or any compound, manufacture, salt, derivative, or preparations from opium or coca leaves. It did not contemplate prohibiting the sale of patent and proprietary medicines and domestic remedies by persons other than registered pharmacists, when they were sold in original and unbroken packages.

As was said in the case of State v. Donaldson, 41 Minn. 74,

"Now, the manifest purpose of the act was to protect the public against the mistakes and ignorance of incompetent and unskilled persons in the preparation and sale of drugs and medicines. * * * This is the expressed object of the general provisions of this act. They all look to the protection of the health and lives of the public by restricting the business of preparing and dispensing or selling drugs and medicines to those who have the requisite knowledge and skill on the subject. * * *

"Now, it is a matter of common knowledge that what are called 'patent' or 'proprietary' medicines are prepared ready for immediate use by the public, put up in packages or bottles labeled with the name, and accompanied with wrappers containing directions for their use, and the conditions for which they are specifics. * * * There is nothing that calls into use any skill or science on the part of the one who sells them. One man can do it just as well as another. * * *. The fact that the seller is a pharmacist, of itself, furnishes no protection to the public. * * * merely to limit their sale to pharmacists would furnish no protection to the public, without some further regulation as to inspection or analysis that would tend to exclude from sale those that might be injurious to health, or something requiring pharmacists to exercise their skill and science in determining the quality and properties of such as they sold. If we turn to our statute we find an entire absence of any such provisions. * * * Had the act made pharmacists responsible for their quality, this might have had some tendency to protect the public."

There is no provision or regulation in the pharmacy act of this state requiring an inspection or analysis or something to be done requiring pharmacists to exercise their skill and science in determining the quality and properties of such patent or proprietary medicines when sold in original and unbroken packages.

We must, therefore, necessarily hold that there was no violation of the act in the sale of aspirin or rochelle salts, as the same did not fall within the prohibition of the act.

We have considered the various other points raised and have examined the authorities submitted by the respective parties in their briefs but find therein no contradiction of our conclusions herein stated.

For the reasons hereinabove given, the finding and judgment of the trial court is reversed.

JUDGMENT REVERSED.

BURKE, P.J. AND KILEY, J. CONCUR.

✓ 42982

NATHAN C. KANE and GEORGE ONTWERP,

Plaintiffs - Appellants,

v.

CITY OF CHICAGO, a Municipal
Corporation,

Defendant - Appellee.

APPEAL CASE

APPELLATE COURT

CITY CLERK.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action for property damage arising out of the North Wabash Avenue bridge improvement, in Chicago, which began in 1930 and was completed in 1931. The case was tried three times. In 1935 a jury disagreed, in 1939 a jury gave verdict for the City, but a new trial was granted and this court denied leave to appeal from the order granting a new trial. (41170, April 15, 1940). This appeal is by plaintiffs from a judgment entered June 9, 1942 on a verdict against them.

The property, subject of this suit, is a four story and basement brick building located at the northwest corner of Wabash and Austin (Hubbard Street) Avenues in Chicago, and was at the time of the damage complained of designed, equipped and used for commercial cold storage business. The building is rectangular in shape with a frontage of 100 feet on Wabash Avenue and 50 feet on Austin Avenue and extends to the east-west alley north of Austin Avenue. Wabash Avenue is 66 feet wide, Austin Avenue is 74 feet wide, and the alley 18 feet wide. The first street north of Austin is Illinois Street, next Grand Avenue. The first and last street south before the Chicago River is Kinzie, and between it and the River lies the right of way and tracks of the Chicago & Northwestern Railroad. Before the improvement in question, these streets and the alley were at the same grade as Wabash Avenue; and the latter stub-ended at the south line of Kinzie Street and extended about a mile north of Austin

Avenue where it merged into Rush Street. There were no street car tracks on Wabash Avenue which, along plaintiff's property, had a 38 foot roadway and a 14 foot sidewalk raised 8 ^{inches} feet above the street level. In 1930 plaintiffs' building known as "C", was one of 8 warehouses operated by the Monarch Refrigerating Company.

Trial was had on seven counts of the twelve count amended complaint. Five counts were stricken on plaintiffs' motion. The substance of the seven counts is that the City, pursuant to the Wabash Avenue Bridge improvement ordinance, and as an accommodation to the Chicago & NorthWestern Railroad, built the superstructure of the Bridge at such an elevation that it passed plaintiffs' property 12 feet above the normal grade at Wabash Avenue; that the north approach came to grade at Grand Avenue instead of at Austin Avenue by reason of the accommodation; that to support the superstructure, Wabash Avenue, Austin Avenue, the alley referred to and other surrounding streets were invaded and excavated for supports for the superstructure, and the normal levels of Wabash and Austin Avenues and the alley disturbed; that the plaintiffs relied upon, as was their right, the City's maintenance of the streets and alley at their normal level; that as a result of the change of the levels of Wabash and Austin Avenues and the alley, and the placing of supports for the superstructure in Wabash Avenue, the City interfered with plaintiffs' right to egress and ingress and rendered its property inaccessible to and from other parts of the City; that as a result of the foregoing changes in the streets, the supports and the superstructure, and the construction of a concrete stairway leading from the west side of the upper level to the north sidewalk of Austin Avenue, plaintiffs' normal efficient loading facilities have been interfered with and their right to light and air violated; that by reason of the excavation of the streets and alley and the digging of

reason of the excavation of the streets and alley and the finding of
interfered with and their right to light and air violated; that by
Avenue, respectively, normal elevation found; facilities have been
the west side of the upper level to the north almost of level
streets, and the construction of a private driveway leading from
the foregoing changes in the street, the property and the upper-
accessible to and from other parts of the block; that as a result of
this, right to access and passage and therefore the property in-
the superstructure in ground below, or with interference with drain-
and Austin Avenue and the alley, and the finding of support for
normal level; that as a result of the changes in the level of the
right, the right of the property owner to use the same as a part
the alley disturbed; that the finding of the level of the street
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Avenue, respectively, finding of level, and the finding of level
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approach case in order to the street and the alley and the
18 feet above the street level, and the finding of level of the
of the bridge to the street level, and the finding of level of the
to the street level, and the finding of level of the street and the
Avenue Avenue, respectively, finding of level, and the finding of level
substance of the street level, and the finding of level of the
complaint. Five copies of the report were submitted to the
Trial at the time of the hearing, and the same were placed
of 3 witnesses appeared at the hearing in connection with the
street level. In 1900 the street level was found to be at
25 feet roadway and a 12 foot sidewalk, and the finding of level
tracks on either side of the street, and the finding of level of the
Avenue where it crosses the street level, and the finding of level of the

trenches and caissons in Wabash Avenue, the lateral support for plaintiffs' property was weakened and the foundation and building caused to lean and settle, with the consequent damage to its exterior and interior; that as a result of the damage the property is unfit for its best use and its value greatly depreciated; and that the improvement was without plaintiffs' consent and no compensation paid them and their damage was \$200,000.

The evidence for plaintiff shows that before the improvement the property was located in a warehousing district in which food products were the principal merchandise. The refrigeration for the building was piped from a refrigerating system in another building. The normal business practice brought trucks carrying merchandise for storage or to carry from storage, which were backed against the Wabash and Austin Avenue curbs, where the merchandise was unloaded and hand-trucked into the building through a 6 or 7 foot wide door on Wabash Avenue near the alley. Trucks also unloaded through a 6 foot wide alley doorway several feet west of the east building line, the sill of which was 42 inches above the alley level. These procedures were reversed for loading merchandise on to the trucks. An electric elevator was operated in the northeast corner of the building, its south gate about even with the north side of the Wabash Avenue door and its west gate about even with the east side of the alley door. The merchandise was checked and weighed on the first floor and carried by the elevator to storage space in the upper floors. The customary merchandise stored was perishable goods, nuts, figs, raisins, cheese, apples and eggs.

This appeal was taken to the Supreme Court, where, before being transferred here (Kane v. City of Chicago, 384 Ill. 361), that court decided that this was a common law action for damages and that the plaintiffs were not entitled to compensation on the

trenches and adjacent to these trenches, the electrical conductors for
the plant, consisting of overhead and underground lines, were
caused to leave the trench, and the overhead lines to the adjacent
and interior, and it is a fact that the conductors were
for the past year or more, and the conductors were
improvement of the electrical system, and the conductors
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This conduct was also in the upper part, and the conductors
being transferred here (King v. City of Japan, 1904 171, 181),
that court decided that this was a contract for damages
and that the plaintiffs were not entitled to compensation on the

theory that the Bridge improvement was an additional servitude upon their fee to the center of Wabash Avenue for which they were entitled to compensation. That decision disposes of all points urged by plaintiffs based on the theory that part of its property was taken.

There is no merit to plaintiffs' contention that they are entitled to damages for the interruption of their business by the excavation of the streets and alley. Osgood v. City of Chicago, 154 Ill. 194. In City of Chicago v. Koff, 341 Ill. 520, relied on by plaintiffs, part of the property was taken and a different rule was applied.

Plaintiffs urge that the verdict is clearly against the weight of the evidence. In an action of this kind, the true measure of damages is the difference between the fair, cash market value of the property unaffected by the improvement and that value affected by the improvement, and benefits may be set off against damages. Department of Public Works, v. McBride, 338 Ill. 347. Benefits flowing directly from a public work, although common to the neighborhood, may be considered. Gehegan v. Union Elevated R. R. Co., 292 Ill. 261. Assuming, therefore, that certain damages to the property are not disputed in the evidence, that alone would not entitle plaintiffs to a recovery.

The several elements of damage claimed by plaintiffs generally arise out of the excavations in the streets and alley to accommodate the declining upper level, the digging of caissons and trenches to support the pillars holding the superstructure, and the construction of the superstructure against the building; and those resulting from the completed improvement. We shall consider these in a somewhat reversed order for convenience sake. In the latter division are the claims of interference with previously established efficient practices of loading and unloading trucks serving the

warehouse, interference with egress and ingress and with the accessibility of the property to other parts of Chicago, and obstruction of light and air. In the first division are the various aspects of damage to the physical property.

We shall first consider the elements of damage attributed to the completed improvement. The nature of the business required, and the evidence shows, that in the building involved, the doors, except those used in loading and unloading, and windows are boarded up. While the superstructure and the stairway darkened the sidewalks of Wabash Avenue and some of Austin Avenue respectively, the jury may have believed that whatever damage was suffered in this respect was neutralized by the benefits from the covering which the superstructure afforded the Wabash Avenue sidewalk, since there was evidence that another Monarch building had such a covering and that modern warehouse loading facilities are recessed.

After the improvement, because of a retaining wall at the north line of Illinois Street, it was necessary for traffic bound north of Illinois Street on Wabash Avenue lower level to go one block east to Rush Street or west to State Street. This is a basis for the claim that there was damage to ingress and egress and accessibility. We believe that, since the retaining wall was at the north side of Illinois Street, plaintiffs' damages were not special as they might have been had they been deprived of the Illinois Street outlet. It is our view that plaintiffs' damages in this respect were the same as the rest of the public who might care to go north on the lower Wabash level. C. Hacker Co. v. City of Joliet, et al., 196 Ill. App. 415; City of East St. Louis v. O'Flynn, 119 Ill. 200; Guttery v. Glenn, 201 Ill. 275; Malleable Iron Co. v. Park Commissioners, 263 Ill. 446; Hill v. Kimball, 269 Ill. 398. There was, therefore, no error in the exclusion of testimony for plaintiffs pertaining to this claim.

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up. While the superintendence and the building carried the evidence
of damage to the building and some of the damage respectively, the jury
may have believed that the damage to the building in this respect
was neutralized by the benefits from the covering which the super-
structure afforded the building. Since there was
evidence that another damaged building had been a covering and that
modern warehouses located nearby are covered.

After the improvement, because of a building well at the
north line of Illinois Street, it was necessary for traffic bound
north of Illinois Street to descend to a lower level to go one block
east to Rush Street or west to State Street. This is a basis for
the claim that there was damage to ingress and egress and necessity.
We believe that, since the remaining well was at the north side of
Illinois Street, plaintiffs' damages were not created at that right
have been had they been deprived of the Illinois Street outlet. It is
our view that plaintiffs' damages in this respect were the same as
the rest of the building who might care to go north on the lower level.
level. G. Wagner Co. v. City of Chicago, 196 Ill. App. 415;
City of East St. Louis v. O'Ryan, 115 Ill. 200; Quincy v. Chicago
201 Ill. 278; Wells Fargo & Co. v. Park Commissioners, 228 Ill. 448;
Mill v. Chicago, 203 Ill. 398. There was, therefore, no error in the
exclusion of testimony for plaintiffs pertaining to this claim.

Furthermore, though the Bridge carried traffic north on the upper level past plaintiffs' property to Grand Avenue, this did not detract from the value of the property because Wabash Avenue prior to the improvement stub-ended at Kinzie Street, and offered no way over the river, and State Street and the lower level of Michigan Avenue serve traffic to and from the Loop as formerly. The pillars in the intersection of Austin and Wabash Avenues and the two foot gradual change of grade in the latter since the improvement, could be considered mere inconveniences by the jury under the facts here.

The Wabash Avenue Bridge was constructed northwesterly across the River to the north bank, thence in a northeasterly direction to Grand Avenue where the Bridge approach came to grade. In order to maintain a lower level for Wabash Avenue the normal street grade was depressed and as a result the roadway is 62 inches below sidewalk level at the northeast corner and 42 inches below sidewalk level at the southeast corner of plaintiffs' property; and the alley is 60 inches below the level of the sidewalk at the west side of Wabash Avenue, and at the west end of the property 27 inches below its former level. The new grade in the alley places the sill of the alley door 87 inches instead of 42 inches above the alley level. So far as loading and unloading facilities are concerned, we believe the jury could find that neither the change in grade at Austin Avenue, nor the construction of the stairway affect substantially the value of plaintiffs' property. Any merchandise loaded or unloaded there was hand trucked about 100 feet to or from the Wabash Avenue door. The evidence of previous trucking at this point, moreover, was not convincing. At the alley, according to the evidence, there was damage because here previously the floors of trucks and sill of the alley door were about flush and now a lift of 45 inches or an equivalent lowering is necessary. On Wabash Avenue, formerly trucks

were unloaded by lowering merchandise 36 inches from the 42 inch truck floors to the sidewalk 6 inches above street level or 18 inches to a hand truck. After the improvement the sidewalks near the north end of the property were 20 inches higher than the truck floors and at the south end 15 inches lower, thus at the north merchandise had to be lifted 20 inches and at the south lowered 15 inches to the sidewalk. Between these extremes were varying levels, with the ideal 42 inch sidewalk level sufficient only for two trucks. It is plain that since only 4 to 6 trucks could be serviced simultaneously before the improvement, the greater differences have not substantially affected the unloading practice, especially when we consider that what disadvantages or advantages existed in unloading were set off by advantages or disadvantages in loading. Furthermore, the jury may have considered that loading or unloading in the alley was less convenient than at Wabash Avenue and that when there was room on Wabash Avenue, the alley would not be used. There would not be room at Wabash Avenue, however, only when all space there was occupied and 4 to 6 trucks were being loaded or unloaded. The inference suggests itself, therefore, that with 4 to 6 trucks being loaded or unloaded at Wabash Avenue - having in mind the Wabash Avenue door, the alley door and the location of the elevator - there was little, if any, opportunity for efficient loading or unloading in the alley. The evidence shows that modern warehouses have loading platforms recessed in the building at the level of truck floors. Before the improvement, the level of the sill of the Wabash Avenue door was 18 inches above sidewalk level. To offset the necessity of lifting merchandise or hand trucks the 18 inches, a loading dock was used. It was a wooden platform 18 inches high, 6 or 8 feet wide and 20 feet long with sides sloped to obviate a step. It is claimed that the pillars in the center of Wabash Avenue affected the maneuverability of trucks in

were unloaded by jacking... were unloaded by jacking...
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sidewalk. Between these... sidewalk. Between these...
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center of Kebash Avenue affected... center of Kebash Avenue affected...

loading and unloading. The pillars are 36 feet apart north and south and at least the width of the alley east of the sidewalk edge. We think the jury could properly find that there were no damages suffered by plaintiffs on this score.

We turn to the alleged elements of damage which affected the physical property and its use. The evidence is that plaintiffs' predecessor, Espert, purchased the property in 1925 for \$75,000 and spent sizeable sums rehabilitating and converting it for cold storage purposes. Plaintiffs' experts estimated the value of the land and building in 1930 "unaffected by the improvement" at \$120,000, \$115,000 and \$110,000, with the building valued near \$40,000; and its age then at about 36 or 37 years. Testimony for plaintiffs also was that before the improvement the building was in sound condition, its walls and columns plumb, its structure sound and, except for superficial cracks in exterior walls, they and the interior were in good condition. The experts testified that following the improvement the south and east walls leaned south and east respectively out of plumb; that the roof pulled away from the west and north walls; that the west wall leaned east; that walls and columns were out of plumb, joists wrenched from their setting and that floors were out of level; and that structural cracks were made in exterior walls. This damage was attributed to the digging in Wabash Avenue of nine caissons 5 feet wide and 80 to 100 feet deep, on which were laid concrete girders in trenches dug 10 to 12 feet deep - 2 feet below the foundations of the building - and 6 to 7 feet wide which supported the pillars holding the superstructure. The excavation and digging, they said, caused the soft sandy loam to slip laterally, weakening and undermining the foundations of plaintiffs' building. There was testimony for the City that in 1924

loading and unloading. The pillars are 36 feet apart north and south and at least the width of the alley east of the sidewalk edge. We think the jury could properly find that there were no damages suffered by plaintiffs on this score.

We turn to the alleged damage to the building which affected the physical property and its use. The evidence is that plaintiffs' predecessor, Robert, purchased the property in 1924 for \$75,000 and spent a considerable sum rehabilitating and converting it to the sole storage purpose. Plaintiffs' father estimated the value of the land and building in 1930 "unaffected by the improvement" at \$120,000, \$115,000 and \$110,000, with the building valued near \$40,000; and its age then at about 25 or 27 years. Testimony for plaintiffs also was that before the improvement the building was in sound condition, its walls and columns strong, its structure sound and, except for superficial cracks in exterior walls, they and the interior were in good condition. He further testified that following the improvement the south and east walls leaned north and east respectively out of plumb; that the roof pulled away from the west and north walls; that the west wall leaned east; that while and columns were out of plumb, joints weakened from their setting and that floors were out of level; and that structural cracks were made in exterior walls. This damage was attributed to the digging in Wabash Avenue of nine caissons 5 feet wide and 80 to 100 feet deep, on which were laid concrete girders in trenches dug 10 to 12 feet deep - 2 feet below the foundations of the building - and 8 to 7 feet wide which supported the pillars holding the superstructure. The excavation and digging, they said, caused the soil sandy loam to slip laterally, weakening and undermining the foundations of plaintiffs' building. There was testimony for the City that in 1924

the floors sagged, the building walls were cracked, sills were not level and the building appeared to be overloaded; that in 1934 the building leaned west, as a result of the excavation, below foundations of plaintiffs' building, for the construction of the next building west; that in 1934 the interior joists, columns and floors showed overloading and the west wall did not lean east; and that the building in 1930 was more than fifty years old, which was beyond its economic life. These contrarieties required the jury's appraisal of the credibility of the witnesses. The witnesses for plaintiffs say they saw only hairline cracks in exterior walls before the improvement, but Witness Noe, who said there were no structural cracks, then admitted, upon being shown a photograph of the building before the improvement clearly showing structural cracks, that there were 3 or 4 structural cracks in the walls on the street and alley sides. The testimony of Witness Kaplan, for the City, as to the condition of the building in 1924, was weakened by the fact that Espert, thereafter, rehabilitated the building. The testimony of Witness O'Donovan, for the City, as to the age of the building - so far as based on conversations with others - should have been stricken. From his testimony, however, that the City Building Records did not disclose when the building was built and that the records began in 1879, an inference of age was drawable. His testimony of condition of the building before the improvement was not convincing, but his testimony of what he found in 1934 and just before the trial was. The claimed damage to the building appears to be about \$30,000.

The City offered and the court admitted in evidence photostatic copies of two letters from the City Building Department to the Monarch Refrigerating Company in August 1929 and May 1930, based upon written reports of building inspectors, not available as witnesses, which carry the implication of overloading. These letters

The floor slabs, the building with its exterior walls were not level and the building was not level in 1934. The building leaned west, as a result of the excavation, below foundations of adjacent buildings. In the excavation of the next building west; that in 1934 the interior columns and floors showed overloading and the west wall had been east; and that the building in 1934 was not level. This was the jury's appraisal of the condition of the building. The witnesses for plaintiff say that they saw only slight cracks in exterior walls before the improvement, but witness for the defendant says that there were no structural cracks, then admitted, when being asked to describe it of the building before the improvement clearly showing structural cracks. That there were 3 or 4 structural cracks in the wall on the street and along sides. The testimony of witness for the City, as to the condition of the building in 1934, was weakened by the fact that Expert, therefore, contradicted the building. The testimony of Witness O'Donovan, for the City, as to the condition of the building - no far as based on conversation with witness - should have been given. From his testimony, however, that the City Building Records did not disclose when the building was built and that the records began in 1878, an inference of age was available. His testimony of condition of the building before the improvement was not convincing, but his testimony of what he found in 1934 and just before the trial was. The claimed damage to the building appears to be about \$20,000. The City offered and the court admitted in evidence photographic copies of two letters from the City Building Department to the Munroe Refrigrating Company in August 1930 and May 1930, based upon written reports of building inspectors, not available as witnesses, which carry the implication of overloading. These letters

were self-serving and should not have been admitted. City of Chicago v. Rust, 117 Ill. App. 427. Plaintiffs' witness Kuehl, who examined the property for an insurance company in 1929, said he made no inspection or inquiry for overloading. Harris, superintendent of the building, said that prior to 1930, merchandise was loaded 250 pounds per square foot on the first floor, 185 on the second, and 150 on the third and fourth. O'Donovan said allowable loads were only 175 pounds per square foot and that two weeks before the trial he saw eggs piled at the rate of 250 pounds per square foot. Harris testified that the damage to the structure resulting from the excavation etc., rendered the building difficult to maintain as a cold storage warehouse because of the air seepage, causing condensation and fluctuation of temperature; that since 1930 no figs, apples or dry food were stored, and that since 1932 no perishables had been stored because of the humidity and that business had dropped off about 30 percent. O'Donovan testified that in 1934 he saw the first floor stored with apples and cheese; the second with apples, raisins, figs and cheese; the third with apples and on the fourth with apples and beer. There was no rebuttal on this point.

Plaintiffs argue that there were no benefits accruing to its property by virtue of the improvement and, that since the evidence shows certain damage, the verdict is unjustified. It points to its loss of business following the improvement. There was evidence that the City Produce Market which was previously located across the River from the area of the improvement had been moved to make way for the Wacker Drive improvement. The City argues that if business fell off, this removal is responsible. Plaintiffs argued that the lack of new building in the vicinity indicated that no benefits accrued. The City answered that that is no fair criterion, because the real estate depression commencing in 1930, and the war which followed, were

responsible for the lack of building. It argues that the improved loading facilities because of the cover; creation of new frontage upon the upper Wabash Avenue level, with opportunity for offices and display rooms; and the resurrection of the property from oblivion were benefits which far outweighed any damage. The City argues that the building by its nature was not highly adaptable to the use claimed; and that its age, absence of switch track and its antiquated loading facilities militated against the use. Its contention is that the building had outlived its economic existence; that it was not fit for the high use claimed by plaintiffs; that the improvement did not interfere with the limited use as evidenced by O'Donovan's testimony; and that the benefits accrued to the land for future development. Its experts estimated an increased value of \$10,000 to the land; and that the building had only nominal value before the improvement and should be torn down and replaced by a modern seven story and basement warehouse building suitable to exploit the benefits. Plaintiffs refer us to Boulevard Bridge Bank v. City of Chicago, 304 Ill. App. 190 to minimize the claim of benefits from the upper level. In that case the court said that the cost of remodeling to conform would be prohibitive. In the instant case the jury may have believed it was not a question of remodeling, but of rebuilding.

The jury heard the testimony, saw the witnesses and observed photographs of the building before, during and after the improvement and heard the range of estimated values in 1930 - from \$120,000 (\$80,000 for land and \$40,000 for building) to \$55,000 for the land and nothing for the building. It viewed the premises before its deliberation. We cannot say that its verdict was not justified. We have read the cases cited by plaintiffs involving damages to other properties affected by the Bridge improvement, and found each case distinguishable from the instant case.

There were errors committed in the treatment of testimony. We have referred to two instances. The trial court admitted evidence of benefits accruing to property south of the Chicago River as a result of the Wacker Drive improvement. In assigning error plaintiffs rely upon City of East St. Louis v. Vogel, 276 Ill. 490. To support the ruling the City relies on Metropolitan Railroad Co. v. White, 166 Ill. 375. Neither case controls. The testimony was not relevant, especially here where there was such a wide difference between the improvements and the circumstances surrounding the City. I. & M. R. R. v. Freeman, 210 Ill. 270. We do not consider the errors, under the circumstances of the case, grievous.

The court refused to give certain instructions offered by plaintiff with reference to lateral support. It gave another instruction covering the point and also one covering the question of damages resulting from the excavation. We think there was no error committed in instructing the jury.

We have considered all that we deem necessary to a decision in this case. For the reasons given the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND LUPE, J. CONCUR.

There were errors committed in the treatment of testimony. We have referred to two instances. The trial court admitted evidence of benefits accruing to property owner of the Chicago River as a result of the Lockport River improvement. In addition, error plain-
 little rely upon City of Chicago v. Lockport, 173 Ill. 480.
 To support the ruling the City relied on Lockport v. Chicago.
v. White, 188 Ill. 378. Lockport v. Chicago, 173 Ill. 480. The testimony was not relevant, especially where there was such a wide difference between the improvements and the circumstances surrounding the City. I. & N. W. v. Lockport, 182 Ill. 370. To do not consider the error, under the circumstances of the case, otherwise. The court refused to give certain instructions offered by plaintiff with reference to benefit of property. It gave another instruction covering the point and also one covering the question of damages resulting from the improvement. We think there was no error committed in instructing the jury. We have considered all that is given necessary to a decision in this case. For the reasons given the judgment is affirmed.
 JAMES W. WHITE.

HOKER, J. AND LUTHER, J. JOSEPH.

43053

STANDARD DISCOUNT CO., INC.,
Appellee,

v.

METROPOLITAN LIFE INSURANCE
COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for \$274.70 and costs entered against it upon an insurance policy issued upon the life of Alice Jackson, who died May 15, 1943, in which her husband, David L. Jackson, was named as beneficiary.

Three days after the death of the insured the beneficiary assigned all of his right, title and interest in and to the proceeds of the policy to plaintiff, a corporation engaged in the business of making loans to undertakers for funerals conducted by them. It is not a national bank, state bank or trust company. Proper notice was given to the defendant but it refused to recognize the assignment. The sole question involved on the appeal is the validity of the following provision of the policy: "Assignability--This policy may be assigned to any national bank, state bank, or trust company, but any assignment or pledge of this policy or of any of its benefits to an assignee other than one of the foregoing shall be void." This question, in relation to a policy issued by defendant providing that "Any assignment or pledge of this Policy or of any of its benefits shall be void," has been decided adversely to defendant by this court in Standard Discount Co. v. Metropolitan Life Ins. Co., 321 Ill. App. 220, and Morticians' Acceptance Co. v. Metropolitan Life Ins. Co.,

STANDARD INSURANCE CO., INC.
NEW YORK, N. Y.

NEW YORK, N. Y.
CO. OF THE CITY OF NEW YORK

THE CITY OF NEW YORK
COUNTY OF NEW YORK

IN SENATE
JANUARY 1, 1911

REPORT OF THE COMMISSIONER OF INSURANCE
ON THE PROCEEDINGS OF THE COMMISSIONER OF INSURANCE

IN THE MATTER OF THE LIFE OF DAVID
INSURANCE CO., INC.

IN SENATE
JANUARY 1, 1911

REPORT OF THE COMMISSIONER OF INSURANCE
ON THE PROCEEDINGS OF THE COMMISSIONER OF INSURANCE

IN THE MATTER OF THE LIFE OF DAVID
INSURANCE CO., INC.

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REPORT OF THE COMMISSIONER OF INSURANCE
ON THE PROCEEDINGS OF THE COMMISSIONER OF INSURANCE

IN THE MATTER OF THE LIFE OF DAVID
INSURANCE CO., INC.

2.

321 Ill. App. 277; and by the Supreme court in the recent case of Lain v. Metropolitan Life Ins. Co., Docket No. 26145. Our opinion has been delayed until the decision in the latter case.

The judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

These are the only two cases of this kind which have been reported in the literature. The first case was reported by Smith and Jones in 1954. The second case was reported by Brown and White in 1956.

These

are the only two cases of this kind which have been reported in the literature.

These are the only two cases of this kind which have been reported in the literature.

43202

GREAT NORTHERN STORE FIXTURE
MFG. CO., a corporation,
Appellee,

v.

MAURICE M. LAMM,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an order denying his second amended petition to vacate or open up a judgment by confession entered against him upon his promissory note for \$1,500, payable in monthly installments of \$500 each on the first day of each and every month commencing November 1, 1943.

Defendant had paid the first installment of \$500, and the judgment (\$1,142.50) covered the unpaid principal of \$1,000, interest \$10, and attorney's fees \$132.50. The note was given for the balance of the purchase price of certain store fixtures which the plaintiff, payee of the note, was to build and install in defendant's clothing store at a total cost of \$3,000. The petition alleged certain defects in the fixtures and breach of warranty, with consequent damage to defendant in excess of the unpaid balance on the note, which defendant sought to set up by way of recoupment in extinction of plaintiff's claim. A second defense was that the note had been delivered "to the plaintiff conditionally only, as security for payment of the contract price when the same shall become due upon the proper fulfilment of the said contract," and that "It was expressly stipulated and agreed between the plaintiff and the defendant at the time of the delivery of the said note that the same should

43202

GREAT NORTHERN TRADING CO.,
INC., a corporation,
Plaintiff,

COURT OF COMMONS, CHANCERY
DIVISION

v.

MAURICE W. LEE,
Defendant.

MR. JUSTICE L. J. BURTON

Defendant's motion is now before the court. A second amended petition to vary the order made in the first petition is filed against him upon the basis of the facts set out in the monthly installments of £100 each on the first day of each and every month commencing on the 1st day of January, 1941. Defendant's motion is for the first installment of £100, and the judgment (£1,142.50) covered the whole principal of £1,000, interest 10, and attorney's fees £14.50. The note was given for the balance of the purchase price of a plain stone fireplace which the plaintiff, as owner of the note, was to build and install in defendant's old house at a total cost of £1,000. The petition alleged a plain stone fireplace in the fireplace and breach of warranty, with consequent damage to defendant in excess of the unpaid balance on the note, which defendant sought to set up by way of recoupment in defence of plaintiff's claim. A second defence was that the note had been delivered "to the plaintiff conditionally only, as security for payment of the contract price when the same shall become due upon the proper fulfilment of the said contract," and that "it was expressly stipulated and agreed between the plaintiff and the defendant at the time of the delivery of the said note that the same should

2.

not be valid and should not be exercised, but in circulation or confessed upon except upon the full, faithful, proper and complete performance of the terms of the said contract by the plaintiff," and that the confession of the judgment was in violation of and a breach of the conditions upon which the note was delivered. Defendant contends that the trial court denied his petition solely upon the ground that the defense submitted was a set-off or counterclaim and that a judgment by confession could not be opened up to permit a defense of that nature, and his original brief is devoted exclusively to drawing a distinction between recoupment and set-off or counterclaim where a defendant seeks a recovery upon matters not connected with the subject matter of the judgment or seeks affirmative relief in excess of the amount claimed by the plaintiff in respect to the subject matter of the judgment.

After defendant's brief was filed this court handed down its decision in State Bank of Blue Island v. Kott, 323 Ill. App. 27, which authorized the opening up of judgments by confession to permit the defendant to interpose a counterclaim. Plaintiff accepted this decision as controlling the point urged by defendant and devoted its brief to supporting the judgment of the trial court by attacking defendant's petition as failing to set up a meritorious defense, first on the ground that defendant's right of action for the alleged breach of warranty and the damage resulting therefrom was controlled by sections 49 and 69 of the Uniform Sales Act (Ill. Rev. Stat. 1943, chap. 121 1/2, pars. 49 and 69) and defendant did not bring his claim within their provisions, and secondly, that the petition failed to set up a conditional delivery of the note. Section 49 provides that "... if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or

not be valid and should not be enforced, but in consideration
or confessed upon exact upon the full, faithful, proper
and complete performance of the terms of the said contract
by the plaintiff," and that the condition of the judgment
was in violation of and a breach of the conditions upon
which the note was delivered. Defendant contends that the
trial court denied the motion made upon the ground that the
defense submitted was a "set-off" or counterclaim and that a judge-
ment by confession could not be opened up to permit a defense
of that nature, and his original order is devoted exclusively
to drawing a distinction between plaintiff and set-off or counter-
claim where a defendant asserts a set-off upon matters not connected
with the subject matter of the judgment or seeks affirmative
relief in excess of the amount claimed by the plaintiff in respect
to the subject matter of the judgment.

After defendant's motion was filed this court handed down
its decision in State Bank of Iowa v. Koff, 303 Ill. App.
37, which authorized the opening up of judgments by confession
to permit the defendant to introduce a counterclaim. Plaintiff
accepted this decision as controlling the point urged by defen-
dant and devoted its brief to supporting the judgment of the
trial court by attacking defendant's petition as failing to set
up a meritorious defense, first on the ground that defendant's
right of action for the alleged breach of warranty and the
damage resulting therefrom was controlled by sections 49 and
50 of the Uniform Sales Act (Ill. Rev. Stat. 1943, chap. 121 1/2,
para. 49 and 50) and defendant did not bring his claim within
their provisions, and secondly, that the petition failed to
set up a conditional delivery of the note. Section 49 provides
that "... if, after acceptance of the goods, the buyer fails
to give notice to the seller of the breach of any promise or

3.

warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor." Section 69 relates to the damages recoverable. The alleged defects are set up in sub-paragraphs, designated 4(a) through 4(h). The petition alleges that "Immediately following installation of the said fixtures" petitioner notified the plaintiff of the breaches of warranty listed in sub-pars. 4(a) to 4(h) inclusive; that the items under 4(g) and 4(h), being a cracked and broken panel in one of the cases, and a streaked and spotted mirror, "the silvering having become detached from the glass," did not become noticeable until on or about April 10, 1944, and that defendant immediately thereafter notified the plaintiff by his amended petition, filed April 14, 1944.

Plaintiff concedes that the petition sufficiently alleges some breaches of warranty, but insists that the use of the word "immediately," in connection with notice to the plaintiff upon discovery of the alleged breach of warranty, is merely a conclusion of the pleader, and cites in support of its contention Krone Die Casting Co. v. Do-Ray Lamp Co., 297 Ill. App. 602, wherein a plaintiff, setting up breach of warranties as to goods which it had accepted, alleged: "Counter-plaintiff alleges that as soon as it was informed by its jobbers and distributors of the situation concerning the clamps and started receiving returns of said clamps, it notified the counter-defendant of the facts alleged herein." The court there stated that upon proper motion a party alleging breach of warranty should state with a reasonable degree of certainty the time when he learned of the alleged breach and the approximate time thereafter when he gave notice. But the court also held (615) that such objection could not be reached by general motion, but should be specific. In our opinion the allegation of the petition is sufficiently definite to entitle defendant to an opportunity to be heard upon the merits, particularly where

the judgment need not be vacated but merely opened up to permit a defense. The damages claimed by defendant as the result of the alleged breaches of warranty are general damages; namely difference in value between the fixtures furnished and those contracted for, which are permissible under section 69, and need not be alleged with greater particularity.

As to the second defense, that is, conditional delivery of the note, plaintiff urges that the petition merely shows an effort by the defendant to limit the time of payment. If this is the effect of the petition it is, as contended by plaintiff, an effort to vary the terms of the note by parol testimony. This cannot be done. Shiel v. Chicago Title & Trust Co., 262 Ill. App. 410; Weinstein v. Sprintz, 234 Ill. App. 492. On the other hand, it is permissible to show by parol testimony that a promissory note was delivered conditionally and was not to take effect and become binding except upon the happening of certain contingencies. Fronck v. Wroblewski, 255 Ill. App. 529; First Nat. Bank of Granite City v. Draper, 266 Ill. App. 579. Plaintiff argues the payment of the first installment due on the note as evidence of its delivery unconditionally, and also urges the presumption of its unconditional delivery. These are matters which go to the proof or lack of proof of defendant's contention. The merits of the defense stated in the petition or motion to set aside the judgment cannot be inquired into. Stranak v. Tomasovic, 309 Ill. App. 177. The question before the trial court was whether on its face the petition stated a conditional delivery of the note. The language quoted above says unequivocally that the note was delivered only as security for the payment of the contract price when the contract was fully performed and that it was expressly agreed that it should not become valid or judgment confessed thereon except upon the full, faithful, proper and complete performance of the contract by the plaintiff. However doubtful may be defendant's ability to establish this defense, the petition sets up a conditional

the judgment need not be vacated but merely treated up to permit
a defense. The defense claimed by defendant as the result of
the alleged breach of warranty and (damages) namely
difference in value between the fixture furnished and those
contracted for, which are covered by the Uniform Act, and need
not be allowed. *See* Wright v. Wright, 100 Ill. 177.
As to the second defense, that is, conditional delivery
of the note, it is not in issue. It is merely a matter of
fact by the evidence to which the jury is to go. It is
is the effect of the evidence in this case, as compared with
an effort to show that the note was delivered, that
cannot be done. *See* Wright v. Wright, 100 Ill. 177.
App. 410; Wright v. Wright, 100 Ill. 177. In the latter
hand, it is not in issue. It is merely a matter of
fact by the evidence to which the jury is to go. It is
note was delivered. It is not in issue. It is merely a matter of
fact by the evidence to which the jury is to go. It is
become binding upon the defendant. It is not in issue. It is merely a matter of
fact by the evidence to which the jury is to go. It is
Fraser v. Fraser, 100 Ill. 177. It is not in issue. It is merely a matter of
fact by the evidence to which the jury is to go. It is
City v. Fraser, 100 Ill. 177. It is not in issue. It is merely a matter of
fact by the evidence to which the jury is to go. It is
of the first issue, that the note was delivered, that
delivery unconditionally, and also the question of the
unconditional delivery. It is not in issue. It is merely a matter of
fact by the evidence to which the jury is to go. It is
or lack of proof of defendant's defense. It is not in issue. It is merely a matter of
fact by the evidence to which the jury is to go. It is
defense stated in the petition. It is not in issue. It is merely a matter of
fact by the evidence to which the jury is to go. It is
cannot be inferred from Fraser v. Fraser, 100 Ill. 177.
The question before the jury is not the delivery of the note. The language
petition stated a conditional delivery of the note. The language
quoted above says unconditionally that the note was delivered only
as security for the payment of the contract price when the contract
was fully performed and that it was expressly agreed that it
should not become valid on judgment rendered thereon except upon
the full, faithful, proper and complete performance of the contract
by the plaintiff. However doubtful may be defendant's ability
to establish this defense, the petition sets up a conditional

5.

delivery of the note and, that defense like the alleged breaches of the warranty, should be determined upon a trial.

The judgment is reversed and the cause remanded with directions to proceed in conformity with the views expressed herein.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett and O'Connor, JJ., concur.

delivery of the note and, that defense like the alleged breaches

of the warranty, should be determined upon a trial.

The judgment is reversed and the cause remanded with

directions to proceed in conformity with the views expressed

herein.

REVERSED AND REMANDED WITH DIRECTIONS.

Hatchett and O'Connor, J., concur.

43225

DAVID GOTTLIEB, DOROTHY GOTTLIEB
and NATHAN GOTTLIEB, co-partners,
doing business as D. Gottlieb &
Company,

Appellees,

v.

THE ARIDOR CO., a corporation,
Appellant.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for \$763.37 and costs entered against it on a trial before the court without a jury upon a contract under which plaintiffs made certain die punches for defendant.

Plaintiffs based their claim upon a written order prepared by defendant on its printed form and sent to plaintiffs, reading: "Please enter our order for the following: 4 70/m/m Std Die Punches as per drawings T & M," and "\$4.00 Hr" under the heading "Price," and contends that under the contract they are entitled to \$4 per hour for the time actually spent by their workmen in making the punches. Defendant's position is that the order given did not constitute a written agreement between the parties and that it was orally agreed between them that 20 hours was the maximum time for making each punch; that if the order be construed as a written contract the plaintiffs were, nevertheless, obliged to make the punches within a reasonable time, which as shown by evidence received subject to objection, was less than 20 hours per punch, and that any judgment against defendant should not exceed \$320, the contract price for 80 hours' work.

Defendant's evidence, received subject to objection, is that in response to a circular letter soliciting die work, Fleisch, defendant's engineer, communicated with plaintiffs, who sent Ellerman,

DAVID GOTTLIEB, DANIEL
and NATHAN GOTTLIEB,
doing business as
Company,

v.

THE ALIDON CO., a corporation

MR. PR. SIDING COURT

Defendant entered against
upon a contract and
for defendant.

Plaintiff
by defendant on the
"Please enter our
Punches as per dated
"Price," and contract
to \$4 per hour for
making the punches.

not constitute a
was orally agreed
for making each punch;
contract the plaintiff

punches within a reasonable time, which in order of preference received
subject to objection, and that
any judgment against defendant shall be entered in favor of the plaintiff
price for 60 hours' work.

Defendant's evidence, received subject to objection, is
that in response to a circular letter soliciting the work, Alidon,
defendant's engineer, communicated with plaintiff, who sent Alidon,

2.

their representative, to confer with Fleisch; Fleisch explained the work he wanted done and Ellerman said he felt that his shop could take on the work but that he would have to go back and discuss it with his engineer; four or five days later Ellerman reported to Fleisch that he felt his shop could make the type of punch wanted by defendant, and Fleisch then gave him the blueprints for the punches and asked for a bid on four punches; Ellerman replied that he would have to discuss it again with the factory; several days later Ellerman returned with the prints and told Fleisch that they could not give a bid quotation; that in view of the fact that they had never done this type of work before, they would prefer to take it on a time-material basis at \$4 an hour; when Fleisch asked how many hours it would take to make the four punches, Ellerman replied that they could only take the job on a time-material basis, that his tool makers were as good as defendant's and their time would be comparable to defendant's; defendant's tool room foreman then brought his book showing that defendant took 70 hours to make four punches of the 70 millimeter size, and Ellerman then said that anything under 20 hours a punch would be a reasonable time; that Fleisch then gave him the order for the four punches; this order was prepared later and mailed to plaintiffs, along with the blueprints; defendant furnished the material; the punches were made, delivered to the defendant and accepted by it. No complaint is made of plaintiffs' workmanship or the fitness of the punches produced by them. Defendant's tool room foreman testified it would reasonably take between 14 and 15 hours for a tool and die man with three or four years' experience to make a punch complete, including the drilling of the holes, which would take about 2 1/2 hours, making 12 1/2 hours as the reasonable number of hours to make a 70 millimeter standard die punch without holes. No direct ruling on the admissibility of this evidence was made by the court. The written order was accepted by the plaintiffs when they made the punches in

3.

accordance with the contract and delivered them to defendant. The order contains all the essentials of a contract - the names of the parties, the subject matter or thing to be made and the price to be paid - although oral testimony is necessary to explain the abbreviation "T & M" and to show acceptance of the order.

Resort to parol evidence to prove acceptance by performance does not make the contract one resting partly in parol and therefore an oral contract. Plumb v. Campbell, 129 Ill. 101, 108. Parol evidence may be received to explain the meaning of abbreviations in written instruments and to show the words for which they stand. Converse v. Wead, 142 Ill. 132, 137; People v. Thompson, 295 Ill. 187. Similarly, parol evidence is introduced to explain technical or trade terms. We have been referred to no authority holding that the necessity of this evidence converts a written contract into an oral contract. Furthermore, this written order was prepared by the defendant and evidently was intended to contain all of the terms of the agreement. Both parties to the contract agree that plaintiffs' compensation was to be on the basis of \$4 per hour. Defendant now seeks to show by parol testimony that the number of hours to be charged was limited by oral agreement to not to exceed 20 hours per punch. The record does not support this contention. Ellerman, either because of limited authority or experience, returned twice to his engineer before making a proposition to defendant. He then stated plainly that he could not make a bid quotation of the price but could only take the contract on a time and material basis, and admitted (on the assumption that his tool makers were as good as defendant's, although not experienced in this particular work), that 20 hours per punch was a reasonable time for its manufacture. If this was understood by defendant to mean that the time to be expended on each punch would not exceed 20 hours and that the price to be paid for each punch would not exceed 20 hours' time at \$4 per hour, defendant fails to offer any evidence or

4.

suggestion as to why it did not insert this important provision in the order. The mere estimate of time that would probably be expended on each punch cannot control the express provision of the contract to pay upon a time and material basis. In Pittlekow Heating & Eng. Co. v. McCain, 236 Mich. 54, the parties entered into a contract for the doing of work upon a time and material basis, plus 10 per cent of the cost of material furnished; the contract stated that the total cost was estimated to be approximately \$600, but that it should not control; a recovery of practically double that amount - \$1,127.67, was sustained. In Hitt v. Smallwood, 147 Va. 778, the contract provided for the building of a garage at a named price, plus hauling charges and 10 per cent of the hauling charge to the contractor, and also contained an agreement for extra work on the basis of time and material plus 10 per cent. The court held that in the absence of fraud the one hiring the work done assumed the risk of the contractor's lack of experience and inefficiency and, although on the basis of time actually spent the extra work amounted to about three times the cost upon the basis of a reasonable time for the work as shown by the owner's evidence, recovery was allowed. In Goddard Tool Co. v. Crown Electrical Mfg. Co., 219 Ill. App. 34, 40-46, the manufacturer, as in the case before us, refused to make a price, and an oral agreement upon a time and material basis was entered into. The question was raised as to the competency of evidence as to the reasonable time for doing the work specified in the contract. The reviewing court held that such testimony was immaterial; that the parties contracted with reference to the conditions existing in the plant where the work was done, the efficiency, experience and speed of the men there employed, and if any testimony was offered as to reasonable time, the testimony should be based upon the conditions in that plant and not upon general conditions in the trade. There

5.

is no charge of loafing on the job, padding the time, or fraud by plaintiffs to increase the cost to defendant. The trial court rightly held that plaintiffs were entitled to recover on the basis of the time actually spent in the work.

The judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

is no charge of leaving on the job, during the time, or finding

by plaintiffs to increase the cost to defendant. The trial

court rightly held that plaintiffs were entitled to recover on the

basis of the time actually spent in the work.

The judgment is affirmed.

A. V. KENNEDY.

Katohoff and O'Connor, J., concur.

32-1A-588

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APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of \$1,300 entered against him on the verdict of a jury on the trial of plaintiff's claim upon a contract of employment whereby, as alleged in the statement of claim, "defendant would pay to the plaintiff compensation of \$200 per month plus 10 per cent of the profits of the business."

The contract of employment was oral and the only witnesses to its terms are the plaintiff and defendant. Plaintiff had previously worked for the defendant, who for many years had operated an automobile sales agency and at the time in question had the Packard agency. Plaintiff testified that in the early part of January 1941 he accepted defendant's offer to become the manager of defendant's agency and that after discussion of several propositions defendant said that he would pay plaintiff \$200 a month and "10 per cent of the earnings as shown by the Packard statement at the end of the year." Defendant admitted the employment and the promise to pay \$200 a month, but denied any agreement to pay any part of the earnings or profits of the business. It appears from the evidence that around the 20th of each month defendant prepared and transmitted to the Packard company a statement of the earnings of the agency for the preceding month, together

In the Matter of

v.

FRANK ABLEMAN,
as A. & A. ROBERTS,

Defendant.

Before me, the undersigned authority, on this day personally appeared FRANK ABLEMAN, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 1st day of January, 1900.

Notary Public for the State of New York.

of the earnings of the agency for the preceding month, together
defendant prepared and transmitted to the plaintiff company a statement
it appears from the evidence that during the year of each month
agreement to pay any part of the earnings or profits of the business.
employment and the promise to pay such amount, but failed any
Richard statement of the end of the year. Defendant admitted the
1900 a month and "the balance of the year" as claimed by the
several propositions which are set forth in the statement of
the manager of defendant's business and a list of accounts of
part of January 1st of the year 1900, and a list of accounts
had the Richard company. Defendant admitted that the plaintiff
operated an business in the city of New York in the year 1900
previously on or about the year 1900, and that the plaintiff
xx to the same business and that the plaintiff was the owner of the

2.
with a total of the earnings for the year. In January 1942, after the war regulations of automobile sales, plaintiff's employment was terminated and he demanded his 10 per cent of the earnings, shown by the reports to the Packard company to be \$13,505.86 for the year.

On the trial defendant objected to the testimony of the plaintiff to the effect that his 10 per cent of the profits was to be computed on the earnings shown by the Packard reports, as constituting a variance, because under the statement of claim plaintiff was demanding "10 per cent of the profits of the business." This objection was renewed in defendant's motions for judgment non obstante veredicto, for a new trial and in arrest of judgment, and is urged on appeal. The trial court took the position that "the allegation that the plaintiff was to receive ten per cent of the profits was broad enough to permit the proof that the ten per cent of the profits was ten per cent of the profits indicated by the monthly reports which were made each month to the Packard Motor Car Company by the defendant, and that proof having been made, then the only question before the jury is as to whether there actually was a contract entered into between the plaintiff and defendant, and the question of what the actual profits of the defendant were is immaterial as far as the issues of the case." With this position we agree. Defendant took the position that plaintiff was not to receive any compensation beyond the monthly payments of \$200, and consequently the only issue before the jury was whether or not the undertaking as testified by plaintiff had been entered into, and the actual profits of the defendant were immaterial. A variance between allegations and proof in order to be fatal must be substantial and material. "The reason for the rule that allegations and proof must correspond is, that the defendant may not be subjected to another action and recovery for

with a total of the earnings for the year in January 1962.

after the war regulations of automobile sales, plaintiffs.

employment was terminated and he received 10 per cent of the

earnings, shown by the records of the company to be

\$12,500.00 for the year.

On the trial testimony, plaintiffs testified that

plaintiffs to the effect that the 10 per cent of the profits was to

be computed on the earnings and not on the profits, as contended

by the defendant, because the 10 per cent of the profits was

was demanded "10 per cent of the profits of the company." This

objection was overruled by the court for judgment non est.

verdict, for a total of \$12,500.00, and is urged

on appeal. The trial court found that the plaintiffs

that the plaintiffs were to receive 10 per cent of the profits

based upon the profits and not the earnings of the profits

was ten per cent of the profits as shown by the records of the

which were shown to the court by the plaintiffs and the

defendant, and the court found that the only question

before the jury is as to whether the plaintiffs were a contract

entered into with the defendant, and the question

of what the actual profits of the company were is immaterial

for as the income of the company is the basis for the profits, then

defendant took the position that plaintiffs were not to receive any compensation

action beyond the profits received of \$100, and consequently the only

issue before the jury was whether or not the plaintiffs were entitled

by plaintiffs had been entered into, and the actual profits of the

defendant were immaterial. A variance between allegations and proof

in order to be fatal must be substantial and material. "The reason

for the rule that allegations and proof must correspond is, that the

defendant may not be subjected to another action and recovery for

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the same cause. (Wheeler v. Reed, 36 Ill. 81.)" United Cork Companies v. Volland, 365 Ill. 564, 573.

Defendant further contends that, he and plaintiff being the only witnesses to the terms of the contract and being of equal credibility, plaintiff failed to establish his claim and that the judgment should be reversed as being manifestly against the weight of the evidence. The jury are the sole judges of the credibility of the witnesses (Durant v. Rogers, 87 Ill. 508, 512), and although one witness may affirm a fact and another deny, the weight of evidence may be clearly on one side or another. Boylston v. Bain, 90 Ill. 283, 288. The jury and the trial court heard the testimony of the witnesses and observed their demeanor when testifying. Our attention has been called to no fact or circumstance materially militating against the testimony of the plaintiff, so that we cannot say a verdict in his favor is against the manifest weight of the evidence, and cannot substitute our judgment for that of the trial court and the jury. Philpott v. Parham, 316 Ill. App. 278, 281.

The judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

the same cause, (Whitaker v. United States, 101 U.S. 413, 425.)

Corpus v. Voltaire, 101 U.S. 504, 505.

Defendant's only evidence is that of the witness.

The only evidence to the contrary is that of the witness.

equal credibility, and the fact that the witness is a man of

the judgment should be given to the witness.

weight of the evidence, and the fact that the witness is a man of

ability of the witness is a fact that the witness is a man of

although one witness is a man of ability and the other is a man of

of evidence may be given to the witness.

But, in the case of the witness, the fact that the witness is a man of

testimony of the witness is a fact that the witness is a man of

ing. Our attention is called to the fact that the witness is a man of

materially mistaken as to the fact that the witness is a man of

we cannot say that the witness is a man of ability and the other is a man of

of the evidence, and the fact that the witness is a man of

the trial court and the jury. (Whitaker v. United States, 101 U.S. 413, 425.)

275, 281.

The judgment is affirmed.

WITNESSES

Matchett and O'Connor, Attorneys.

43138

ANDREW PACIOREK,
Appellee,

v.

WALTER J. CUMMINGS, as Receiver,
etc., et al., doing business as
CHICAGO SURFACE LINES,
Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for \$10,000.00 in favor of plaintiff, entered on the verdict of a jury. Defendant is a common carrier, operating a system of street cars by electricity. On June 22, 1944, plaintiff became a passenger on one of these cars and was injured. He filed a complaint November 10, thereafter. There was a motion by defendant for an instruction in its favor at the close of all the evidence, denied, and after verdict a motion for judgment for defendant notwithstanding the verdict or, in the alternative, for a new trial, also denied. Judgment was entered, and this appeal followed.

The occurrence of which plaintiff complains took place at the intersection of West Madison and North Clark Streets in Chicago. Plaintiff lived at the Mohawk Hotel, 836 West Madison Street. On the morning of this day he took an eastbound street car and rode to the southwest corner of the intersection, where he alighted. He then walked east to board a northbound car on Clark Street. Plaintiff says he got on the northbound car while it was standing still; that the car started up, slowly at first, "then it moving fast, and it jerk on the middle of the track, and I have my transfer in the hands, and I tried to grab iron, and I don't have no chance, and I fall over on the street". The theory of defendant is that plaintiff did not try to get on the

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car until it was in motion, and that when the rear platform of the car was crossing the south crosswalk of Madison Street, plaintiff reached for the grab handle, took hold of it and fell into the street. Evidence was offered tending to prove these theories. Defendant also offered in evidence an ordinance of the City, providing:

"It shall be unlawful for any person to board or alight from a street car or a vehicle while the said street car or vehicle is in motion."

Defendant cites about fifty cases which hold a plaintiff, getting on a vehicle in motion, is guilty of negligence, which bars recovery. However, the evidence here was conflicting. Plaintiff was corroborated by a disinterested and credible witness and by facts and circumstances. The questions of the negligence of defendant or the contributory negligence of plaintiff were for the jury, and we would not be warranted in setting the verdict aside, either as a matter of law or upon weighing of the evidence. The defendant must, therefore, be held liable.

Nor do we find the damages so excessive as to indicate passion or prejudice on the part of the jury, as defendant contends. Plaintiff was born in a foreign country. He came to this country when twelve years of age. During his life he had worked as a cook. For three successive summers he received pay of \$150.00 per month, with board, room and expenses. At the time of the accident he was not employed and was on his way to a place where he hoped to secure employment. He was receiving unemployment compensation to the amount of \$18.00 per week. He also received the same amount after the accident.

Plaintiff sustained a comminuted fracture of the upper portion of the left tibia, extending into the articular surface of the knee joint. An X-ray examination showed the patella to be normal. Plaintiff was confined to his bed one week, to the

3.

hospital for about four months after his injury. He used crutches for four months after leaving the hospital. The injury was painful. He was attended by Dr. Graham, who said he got a fair result as far as the fracture was concerned. Dr. Hansen for defendant testified there would be a time when the fracture line would be as strong as the normal bone. However, an examination made in June, 1943, disclosed fifteen per cent restriction in the backward reflection of the left knee. This, the doctor thought, could be remedied by exercise and physical therapy. Plaintiff was treated at Henrotin Hospital, by Dr. Graham. He was in traction for about six weeks, then a cast was applied. Dr. Graham also treated him for about a year after he left the hospital. He had edema and swelling of the left leg. There is medical testimony to the effect that the fracture extended into the joint surface and that the action of the joint is permanently injured. Plaintiff still limps on his left leg.

Defendant's doctor examined both legs. The jury had the benefit of his observations and knowledge. He admitted permanent injury to the left limb. Plaintiff's counsel asked the jury be permitted to see both legs. Defendant's attorney successfully resisted. It may be doubted if this helped defendant with the jury. Plaintiff's medical and hospital bills amounted to \$1,000.00. He is unmarried and fifty-one years of age. Plaintiff was a cook his earnings moderate. This did not lessen the pain he suffered. We assume too cooks need good legs as well as other folks. The verdict is large, but it expresses the opinion of the jury, which the trial judge approved. We do not find it excessive.

Defendant contends the court erred in rulings on instructions. In particular, complaint is made of plaintiff's instructions Nos. 2, 3 and 5; that while directing a verdict they did

hospital for about four weeks - the injury. He had

2. The Board shall have the right to make such rules and regulations as may be necessary to carry out the purposes of this Act.

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1. The first step is to identify the problem or question that needs to be answered.

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DATE _____

Approved: _____

UNITED STATES DEPARTMENT OF AGRICULTURE

WASHINGTON, D.C.

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and 20 girls and 1 boy, 3 from the last of the 1960s

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— *Journal of the American Statistical Association*, 1997, 92, 1, 103–110

all before the court. I have not the least doubt of your ability to

VIETNAMESE NATIONALISM AND THE STATE

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10 every one will be happy to see a lot of people at the house.

Page 10

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not include the element of due care. This case is simple. The instructions were quite numerous. Ten were given at plaintiff's request, fifteen at the request of defendant. Seven requested by defendant were refused.

Instruction No. 2, of which defendant complains, told the jury plaintiff had filed a complaint in which he "alleged" that "he was a passenger on said street car in the exercise of due care and caution for his own safety", and that defendant "committed one or more of the following wrongful acts * * *." The instruction concluded:

"If you find, from a preponderance of the evidence under the instructions of the court, that the plaintiff has proved his charges as above set forth, and as set forth in his Complaint, then your verdict should be for the plaintiff and you should find the defendant, Chicago Surface Lines, guilty."

The objection is that the instruction directs the jury to find for plaintiff upon proof of the charges of negligence without specific reference to the allegation of due care. While it may be the instruction could have been better phrased, we think the objection hypercritical. We do not think an intelligent jury, (we must assume this was) would be misled by the language of the instruction.

Neither plaintiff's instructions Nos. 3 or 5 directed a verdict. It is urged No. 3 was defective, as was No. 2, in that while defining the degree of care required of a common carrier toward its passengers, did not limit that care with the phrase consistent with the "mode of conveyance adopted". The omission makes the instruction subject to criticism. However, it was approved in West Chicago Ry. v. Johnson, 180 Ill. 285, and I. C. Ry. v. Hubbard, 106 Ill. App. 462. It would have been proper to include the phrase, but we shall not reverse because of its omission.

not include the element of "to tremble and shudder"

The instructions are given to the student to read the material and to answer the questions.

Never! Not one. I have never, never, never!

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Этот документ является частью архива, относящегося к истории культуры и искусства в СССР.

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think we should not be too hasty in making any decision.

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1. The first of these is the fact that the system is not in a steady state. The system is in a steady state only if the rate of change of the system is zero. In this case, the rate of change of the system is not zero, and the system is not in a steady state.

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circumstances consistent with the "mode of operation" adopted. The

omission makes the instruction subject to criticism. However,

It was approved at the Chicago, Ill. 1933. 111

Page 10 of 10

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-NOTES INC. ET AL.

5.

As to plaintiff's instruction No. 5 it is objected it is said an employer was liable for wrongs committed by his agent or employee without referring to the necessity of due care on the part of the plaintiff. The matter of due care was abundantly covered by instructions given. This instruction does not direct a verdict, and it was not necessary to repeat the law on that subject.

In its reply brief defendant withdraws its objection to refused instruction No. 26, admitting that the subject matter of it was fully covered by other instructions. We hold refused instructions Nos. 28 and 31 were likewise covered and properly refused for that reason.

Defendant also contends the court erred in giving an oral instruction as to the law in the course of the argument to the jury. The record shows the attorney for plaintiff objected to a statement made by defendant's attorney to the effect that plaintiff's attorney knew a certain man. Plaintiff's attorney objected that this was outside the record.

"The Court: Let me make a ruling, and I will give you credit for your time.

Mr. Cunningham: All right.

The Court: The jury are instructed that they must decide the case on the evidence, the evidence that was introduced here, on that and the instruction of the court alone. Either counsel have a right to draw any reasonable inferences from the evidence in the record, and present them to you as argument and as inferences. They are nothing more than that, and are made to help you in your understanding of the case, but the final decision must be based upon the evidence and the inferences you draw on the evidence.

Mr. Cunningham: May I have an exception to the oral instructions on the law given by the court?

The Court: You may."

We think the exception is without merit. In the first place the attorney for defendant said, "All right", consenting to

As to plaintiff's instruction no. 3 it is objected it is said an employer was liable for wrong committed by his agent or employee without referring to the necessity of due care on the part of the plaintiff. The matter of due care was abundantly covered by instructions given. This instruction does not direct a verdict, and it was not necessary to repeat the law on that subject.

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"The Court: Let me make a ruling, and I will give you credit for your time."

Mr. Cunningham: All right.

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Mr. Cunningham: May I have an exception to the oral instructions on the law given by the court?

The Court: You may."

We think the exception is without merit. In the first place the attorney for defendant said, "All right", consenting to

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the court making the statement given, and in the second place everything said by the judge seems to be covered by written instructions. After all, a trial judge must keep order in the court room and remarks made by him to that end are not, as we read the statute on instructions, forbidden.

It is also contended the court erred in receiving evidence tending to show that the injury plaintiff received might have aggravated a condition of varicose veins said to exist on one of the plaintiff's legs, while the complaint did not allege any such varicose condition or aggravation of it. The defendant complains that on the cross-examination of defendant's witness, Dr. Zeitlin, plaintiff's attorney asked him whether "a blow to an area that has some varicose veins" would tend to cure the varicosity or might it aggravate it, to which defendant objected and the court ruled the witness might answer. The doctor then answered in the affirmative. Also in the argument to the jury defendant again objected when plaintiff's attorney called this matter to the attention of the jury and the court overruled the objection and said he might proceed. Defendant cites Quincy Coal Co. v. Hood, 77 Ill. 68; North Chicago Street R. R. Co. v. Lehman, 82 Ill. App. 238; Sutherland on Damages (4th Ed.) Vol. [2], §418, and other authorities to the effect that under a general allegation of damages special damages may not be proved except where the wrong is done wilfully. Illinois Central R. R. Co. v. Siddons, 53 Ill. App. 607, 612. The question of varicose veins was not brought into the case by plaintiff. This was an unusual defense developed by defendant's medical experts, and it was on their cross-examination to test their credibility, etc., that these questions were asked and permitted. Defendant also sought and obtained an instruction covering this phase of the case in its instruction No. 25. The contention now made is hardly fair in view of these facts. City of Chicago v. Rosenbaum, 126 Ill.

the court taking the statement given, and in the second place everything said by the witness is covered by written instructions. After all, a witness must keep order in the court room and remarks made by him to that end are not, as we read the statute on instructions, forbidden.

It is also contended that the court acted in receiving evidence tending to show that the injury to the witness might have aggravated a condition of various values said to exist on one of the plaintiff's feet, while the defendant did not allege any such various condition or condition of feet. The defendant complains that on the cross-examination of defendant's witness, Dr. E. J. Sullivan, the court asked the question "a blow to an arm that had been variously valued would tend to cure the variousity or limit it?" and that the defendant objected and the court ruled the question proper. The doctor then answered in the affirmative. Also in the argument to the jury defendant again objected and the court ruled the question proper to the attention of the jury and the court overruled the objection and said he might proceed. Defendant cites Quincy Coal Co. v. Wood, 77 Ill. 63; North Chicago Street R. Co. v. Johnson, 82 Ill. App. 283; Substantiation on Deceased (4th Ed.), Vol. 12, §418, and other authorities to the effect that under a general allegation of damages special damages may not be proved except where the wrong is done willfully. Illinois Central R. Co. v. Sidgona, 63 Ill. App. 807, 818. The question of various values was not brought into the case by plaintiff. This was an unusual defense developed by defendant's medical experts, and it was on their cross-examination to test their credibility, etc., that these questions were asked and permitted. Defendant also sought and obtained an instruction covering this phase of the case in its instruction No. 25. The contention now made is hardly fair in view of these facts. City of Chicago v. Rosenbaum, 136 Ill.

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App. 93, 96.

It is next contended the court erred in permitting Dr. Turner, a medical witness for defendant, to be cross-examined with reference to X-rays, where no X-rays were called to his attention and no questions as to X-rays put to him on the direct examination. Attention is called to the fact that a motion to strike out this testimony was overruled. Dr. Turner made a physical examination of the plaintiff and testified thereto. In connection with that examination he had used X-rays. Moreover, the record shows that on the trial counsel agreed that the doctor be examined as to the films, Mr. Cunningham stating, "If he wants to show him the X-rays, I have no objection". We hold the error alleged by defendant cannot be sustained.

It is next urged there was reversible error in the ruling of the court on the reference by the attorneys to unemployment compensation. In the argument to the jury attorney for defendant said cooks were very much in demand " * * * yet this man was being supported by the State of Illinois from November up to the date of this accident, notwithstanding the fact that he said that he was working at other places. \$18 a week he was receiving from the State of Illinois. That is the type of the plaintiff in this case." The attorney for plaintiff answered, "One thing is unfair. He says the State has been supporting him when he was out of work. No, sir, that is not true. Any of you men who work, and any of you ladies who work, when you get your pay check, you will see a deduction there. That is unemployment insurance that you pay for." There was an objection by the attorney for defendant, overruled, and defendant now contends this was erroneous in that the law was not accurately stated. As a matter of fact, payments made to plaintiff under the Unemployment Compensation Act (Laws of 1937, p.571; Smith Hurd Ill. Rev. Stat., Chap. 48, par. 217) were wholly immaterial. The

App. 23, 25.

It is next contended that the court was in error in permitting Dr. Turner, a medical witness for defendant, to be cross-examined with reference to his - yes, there is - was he called to his attention and no question as to - yes but to him on the direct examination. Attention is called to the fact that a motion to strike out this testimony was denied. Dr. Turner made a physical examination of the plaintiff and testified thereto. In connection with that examination he had made - yes, moreover, the record shows that on the direct examination the doctor be examined as to the fact, Dr. Turner stated, "If he wants to show him the - yes, I have an objection". He holds the error relied on by defendant cannot be sustained.

It is next urged there was reversible error in the ruling of the court on the reference to the - yes, to unemployment compensation. In the argument to the jury attorney for defendant said words were very much in evidence. "I say this man was being employed by the State of Illinois from November 1930 to the date of this accident, notwithstanding the fact that he said that he was working at other places. I say that he was receiving from the State of Illinois. That is the type of the plaintiff in this case." The attorney for plaintiff answered, "One thing is unfair. He says the State has been compensating him when he was out of work. No, sir, that is not true. Any of you men who work, and any of you ladies who work, when you get your pay check, you will see a deduction there. That is unemployment insurance that you pay for." There was an objection by the attorney for defendant, overruled, and defendant now contends this was erroneous in that the law was not accurately stated. As a matter of fact, payments made to plaintiff under the Unemployment Compensation Act (Law of 1937, p. 571; Smith Hurd Ill. Rev. Stat., Chap. 48, par. 217) were wholly immaterial. The

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attorney for defendant tried to have the jury draw an unfair inference from the fact plaintiff had received such payments. Hoobler v. Voelpel, 246 Ill. App. 69, 78; Montgomery v. Simon, 309 Ill. App. 516. Assuming statements of attorney for plaintiff as to the statute were inaccurate, this matter was injected into the argument improperly by the attorney for defendant, was wholly immaterial, and the ruling of the court thereon was therefore not prejudicial error.

The judgment will be affirmed.

AFFIRMED.

Niemeyer, P. J., and O'Connor, J., concur.

43255

B. H. MOLNER,
Appellant,

v.

JOHN W. SCHAEFLE, et al.,
Appellees.

3241A. 339²

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff, B. H. Molner, from a summary judgment entered against him June 23, 1944, on motion of defendant, Lucile H. Schaeffe. The order dismissed Lucile H. Schaeffe from the cause with judgment for costs against the plaintiff. The suit was begun by Molner as an action at law against John W. Schaeffe and Lucile H. Schaeffe on December 26, 1941. The action was transferred to the equity side of the court. Pending the action John W. Schaeffe died. November 18, 1943, plaintiff by leave filed his fifth amended complaint.

The uncontradicted facts in brief are that George Diettrich, prior to his death, was the owner of a tract of land in Baird & Warner's Subdivision in the Village of Glencoe in Cook County, containing about thirty-eight acres. Upon his death in 1926, it descended to his heirs, who decided to subdivide it. To that end, on November 23, 1926, the heirs conveyed the premises to the State Bank & Trust Company in a land trust described as No. 684. On December 28, 1926, the trustee conveyed this land to John W. Schaeffe and Lucile H. Schaeffe, defendants. The grantees in payment executed their note for \$182,723.00 of that date. The note by its terms became due on or before five years from date. It drew interest at the rate of six per cent per annum, payable semi-annually. Notes representing the interest to become due until maturity were also executed and delivered. All these notes

2.

were by their terms payable to bearer and were secured by a trust deed of even date, executed and delivered by John W. Schaeffle and Lucile H. Schaeffle, his wife, conveying the premises in question as security for the payment of the indebtedness represented by the notes.

On July 10, 1931, the owners of the land, beneficiaries of Trust No. 684, made a written agreement with the trustee to the effect that these notes should be held by it and moneys paid thereon disbursed to them in the proportions following, to-wit:

| | |
|---------------------|---------------|
| Edward J. Knapp | .0877 |
| Winifred C. Knapp | .0877 |
| Tillman Knapp | .0351 |
| Margaret Diettrich | .2105 |
| Frederick Diettrich | .2105 |
| Clara Kupper | .0790 |
| Henry Diettrich | .0790 |
| George Diettrich | .2105 |
| | <u>1.0000</u> |

The interest of Edward J. Knapp in the trust, namely, .0877, was conveyed by mesne to assignment to The Glencoe State Bank, and on October 29, 1940, Albers, who had become its receiver, sold and assigned this interest to the plaintiff, Molner.

By a fifth amended bill Molner set up his title and interest in this trust; states that on March 12, 1931, the amount due on the note had been reduced to \$143,426.66; that the note by its terms thereafter drew interest at the rate of seven per cent per annum. His complaint avers that he, "as the equitable owner of a pro-rata interest therein, has the right to maintain an action thereon for his own use and benefit, to the extent of his ratable interest in and to said note, and in and to the avails and proceeds thereof". He avers a demand on the State Bank & Trust Company to begin a suit against John W. and Lucile H. Schaeffle and its refusal to do so. He makes defendants to the complaint other beneficiaries and their representatives; prays they may

were by their terms subject to the power of the trustee to sell or otherwise dispose of the same at any time and from time to time.

On July 10, 1911, the trustee, John V. Schaeffle and Lucile H. Schaeffle, in question as to the validity of the trust, represented by the trustee.

On July 10, 1911, the trustee, John V. Schaeffle and Lucile H. Schaeffle, in question as to the validity of the trust, represented by the trustee.

John V. Schaeffle
Lucile H. Schaeffle
Trustee of the Trust
John V. Schaeffle
Lucile H. Schaeffle
Trustee of the Trust

The interest of the trustee, John V. Schaeffle and Lucile H. Schaeffle, in the trust, was to be paid to the trustee of the trust, John V. Schaeffle and Lucile H. Schaeffle, and on July 10, 1911, the trustee, John V. Schaeffle and Lucile H. Schaeffle, in question as to the validity of the trust, represented by the trustee.

On July 10, 1911, the trustee, John V. Schaeffle and Lucile H. Schaeffle, in question as to the validity of the trust, represented by the trustee.

3.

answer; that the trust agreement be declared dissolved, an accounting taken and defendants decreed to pay to him anything that may be due, and also that they be restrained from collecting or receiving moneys arising out of the trust estate, and for further relief.

March 3, 1944, Lucile H. Schaeffle answered that she had no knowledge of the trust agreement, that neither she nor her husband were parties to it; that she had no knowledge of the transactions in which the State Bank & Trust Company conveyed the premises to her and her husband; that he was employed in a real estate office; on information and belief she states he was merely a dummy title holder and an accomodation maker of the note; that the persons concerned agreed on the purchase price of the land; that this was to be paid out of the proceeds of the sale of the lots; that there was to be no personal liability on her or her husband; that the proceeds of the sales were applied on the note, and that no payments were made in any other way; that Edward J. Knapp still claimed an interest but was not made a party to the suit; that she does not know about the conveyance of Lawrence J. Knapp to the Glencoe State Bank nor the assignment of Albers as receiver to plaintiff. She avers that no^{one}/other than the State Bank & Trust Company has authority to enforce payment of the note and denies that plaintiff is the equitable owner of any part of the debt or has any right to require payment of the notes; that she has heretofore suggested the death of her husband on December 12, 1943, and now suggests the death of Frederick Diettrich and Tillman Knapp, likewise beneficiaries of the trust. She suggests that Edward J. and Lawrence J. Knapp are not made parties although they claim an interest and are, therefore, necessary parties. She states that the cause of action is barred by the Statute of Limitations, etc.

April 10, 1944, Lucile H. Schaeffle made her motion for

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Guidelines will help you to get the most out of your study

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IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF FLORIDA, IN AND FOR THE COUNTY OF DALLAS, FLORIDA

7. The following information is being furnished to you for your information:

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of the first. She and her sister, who were both

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is derived by the State of Minnesota, 1906.

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summary judgment supported by her own affidavit and the deposition of Lawrence J. Knapp. Plaintiff, Molner, in opposition submitted his own answer and counter-affidavit. The order of June 23, 1944, recites that the motion was considered on the affidavit of Lucile H. Schaeffe and the deposition of Lawrence J. Knapp in support thereof, the answer and counter-affidavit of B. H. Molner and amended answer and counter-affidavit of B. H. Molner, and that it was ordered that the answer and counter-affidavit of B. H. Molner, the amended answer and counter-affidavit of B. H. Molner, are both properly before the court, "and that the answer and counter-affidavit of B. H. Molner shall not be considered as superseded by the amended answer and counter-affidavit of B. H. Molner". Thereupon the orders already described were entered. Defendant's motion was made under Section 57 of the Civil Practice Act, as amended, and Rules 15 and 16 of the Supreme Court made pursuant thereto. (Smith Hurd Anno. Stat., Chap. 110, par. 181.)

Rule 15 (1) of the Supreme Court provides:

"The affidavits in support of a motion for summary judgment shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the plaintiff's cause of action is based; shall have attached thereto sworn or certified copies of all papers upon which plaintiff relies; shall not consist of conclusions but of such facts as would be admissible in evidence; and shall affirmatively show that the affiant if sworn as a witness, can testify competently thereto. If all the facts to be sworn are not within the personal knowledge of one person, two or more affidavits shall be used."

We have given careful attention to the affidavits of Lucile H. Schaeffe and the deposition of Lawrence J. Knapp submitted in support of her motion. The affidavit does not conform to Supreme Court Rule 15(1). Practically the only thing the affiant stated of her own knowledge is that she never paid anything on the note and that she was not one of the original owners or of the

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syndicate for whom her husband was nominee. Her affidavit denies there was any consideration for the note and denied plaintiff acquired any interest in the trust through mesne assignments. The documents attached to plaintiff's pleadings and his affidavit as well as the testimony of Edward J. Knapp contradict her as to that issue. The motion was hers and the affidavit is to be construed most strongly against her, and issues of fact cannot be decided in a proceeding by way of inquisition. Gliwa v. Washington Polish Loan & Bldg. Ass'n., 310 Ill. App. 465; Soelke v. Chicago Business Men's Racing Ass'n., 314 Ill. App. 336; Roberts v. Sauerman Bros., Inc., 300 Ill. App. 213; Barrett v. Shanks, 300 Ill. App. 119; C. I. T. Corp. v. Smith, 318 Ill. App. 642.

The deposition of Lawrence J. Knapp shows in substance that he was an heir of George Diettrich and, as such, one of those who in 1926 conveyed the premises described to the State Bank & Trust Company; that in that year the premises were sold to a syndicate represented by Baird & Warner; that Baird & Warner got the syndicate together; that it consisted of about twenty persons, including the witness; that so far as he knew John W. Schaeffle had nothing to do with getting the syndicate together and was not a member of it; that sixty odd thousand dollars were paid to the heirs at the time of the sale to the syndicate; that as an heir he received a part of the proceeds and that as a member of the syndicate he paid a part of it. John W. Schaeffle was merely a nominee of the syndicate and title was taken in his name. Based on an agreement as to the value of the premises per front foot upon sales of lots, a certain fixed sum was paid to the trust department of the bank and applied in reduction of the principal note. Such payments were endorsed on the note, a release filed of record and distribution made to the beneficiaries. No payments were ever made on the notes except in this manner. Neither heirs

6.

nor beneficiaries, so far as he knew, ever took any steps to collect the note, and they had wiped the unpaid balance of it off their books as a bad investment. As a matter of fact, in so far as ownership by plaintiff of an interest in this trust, he corroborates the affidavit of plaintiff and documents submitted tending to show that plaintiff acquired an .0877 interest from the receiver of the Glencoe State Bank.

This suit bears some of the stigmata of a nuisance suit. It was begun as a suit at law. It became assuit in equity without bringing in other necessary parties. It prays for an accounting and dissolution of the trust. Dismissal of this complaint in equity would probably be held to adjudicate against the plaintiff his claim of title on which his suit is based. The pleadings and the affidavits establish clear issues of fact between the parties on that and other issues. Issues of fact cannot be tried by inquisition.

The judgment and decree will be reversed and the cause remanded.

REVERSED AND REMANDED.

Niemeyer, P. J., and O'Connor, J. concur.

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324 2-1-4
PEOPLE OF THE STATE OF ILLINOIS, Ex rel.,
PAUL F. JONES, Director of Insurance of
the State of Illinois,

Petitioner-Appellee,

v.

NEW HOME BENEFIT ASSOCIATION, a corporation,
Respondent.

SARAH A. SCAGGS,

Claimant-Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

324 I.A. 311
MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The New Home Benefit Association was organized, "not for profit", under the Act of July 1, 1872, on August 8, 1927. It was reincorporated under "An Act to Incorporate Mutual Benefit Associations on the Assessment Plan," etc., approved June 27, 1927. Its principal office was at Abingdon, Illinois, until about the month of July, 1934, when it was moved to 166 West Jackson Boulevard, Chicago, where it continued until January 13, 1941, when it ceased business. After moving to Chicago the Association, about August 2, 1937, began to do business subject to the supervision of the Insurance Department of the State of Illinois, under the Superintendent of Insurance and the Insurance Code.

On February 7, 1927, the Association issued to Dr. A. Scaggs and Sarah A. Scaggs his wife, of Lovington, Illinois, two certificates of membership without medical examinations. The doctor's certificate named the wife, Sarah A., as beneficiary. Her certificate named the doctor, her husband, as beneficiary. Each of the certificates promised to pay to the beneficiary \$1,000.00 on satisfactory proof of the death of the insured while the certificate was in force. The doctor's certificate was No. 183, that of Sarah A., No. 184.

Dr. Scaggs died December 4, 1939, at Lovington, of pneumonia.

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Proofs of death were submitted to the Association by Mrs. Scaggs, December 26, 1939. The Association acknowledged receipt thereof on January 29, 1940, by letter, saying the file had been referred to the claim department, where it was receiving attention. The letter said: "If there is any further information necessary, you will be properly notified". It also called attention to the provision of the certificate giving the Association ninety days in which to pay any approved claim. It was signed by George M. Cobb, president of the Association. Later the Association sent to Mrs. Scaggs a check for \$6.00. She returned it by registered mail with a letter from her lawyer.

January 17, 1940, the Attorney General, in the name of the People on relation of the Insurance Commissioner, filed a petition in the Superior Court, praying the Association be dissolved and liquidated. The petition was in eight paragraphs. It is verified by James U. Cullen, Supervisor of Mutual Benefit Associations in the Insurance Department. He swears he is familiar with the facts as set forth in the petition, knows the contents thereof and that the same are true "in substance and in fact". Paragraphs 3, 4, 5 and 6 aver that after the business of the Association was removed to Chicago its officers, directors, agents, etc. devised a scheme of imposing monthly assessments of at least \$1.00 for each certificate on those who had been members prior to the date of re-incorporation with design to alter and impair their rights as holders of certificates in violation of the laws of this State and the United States and contrary to its charter; that the plan was "to make unlawful assessments every month" in violation of the provisions of Sections 10 and 11 of the Act of 1927, also Section 1 of Article V and Section 1 of Article IX of its by-laws and the provisions of paragraph 5 of its charter of re-incorporation as well as of the original charter of incorporation, under which the insurance contracts were issued and delivered; that the Association did not succeed in forcing two of its members, Dr. A. Scaggs and Mrs. Sarah A. Scaggs,

Records of death were submitted to the living by the State
December 26, 1900. The Association received receipt therefor
on January 10, 1901, by letter, which the file has been referred
to the clerk for filing, and the file is being reviewed. The
letter said: "If the Association has any more news, you
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certificates in violation of the law of the State and the United
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and Section 1 of Article I of the Constitution and the provisions of
paragraph 5 of the charter of re-incorporation as well as of the
original charter of incorporation, which when the insurance contract
were issued and delivered; that the Association did not succeed
in forcing two of its members, Mr. A. Smith and Mrs. Sarah A. Smith

3.

to accept in lieu of their original contracts other contracts altering and impairing ^{their} ~~the~~ rights and benefits; that they nevertheless notified these members that payment of assessments levied against them had not been received and that their policies had been cancelled; that these representations were false and fraudulent because the payments had been received but the officers falsely represented to the members that they must execute a reinstatement application with various warranties carried back to the date of the benefit certificates, namely, February 7, 1927, in order that the defendant corporation might disclaim liability under these contracts when the same matured.

The complaint also alleged that the assessments levied by defendant corporation were not according to law; that the notice thereof did not give the name and address of the deceased member together with the name and address of his beneficiary and the amount due; that the assessments were not levied by the board of directors, as required by law, and were not levied upon a post mortem basis but arbitrarily.

The petition said the defendant issued new certificates to some of its members after its re-incorporation under the Mutual Benefit Act of 1927 for the purpose of escaping its obligations under the original contracts; that it had been guilty of fraud with reference to reinstatement of its members, having from time to time pretended not to have received the assessments paid by the members and requiring the members to make application for reinstatement so as to revive the contestable period and to thereby deprive such members and their beneficiaries from relying upon the incontestability of the certificates in the event of claim.

The defendant answered. On February 10, 1941, a decree was entered finding the issues in favor of the plaintiff and that the Association should be liquidated. The decree appointed the Director of Insurance liquidator and directed him to take possession

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so as to revive the contractible policy and to thereby receive the
members and their beneficiaries from paying into the Insurance Company
of the certificate in the event of death.

The defendant answered, on January 10, 1911, a decree
was entered finding the issue in favor of the plaintiff and that
the Association should be liquidated. The decree appointed the
Director of Insurance Liquidator and directed him to take possession

of the books, records and property of the Association. An order was entered directing all claims to be filed on or before December 1, 1942.

Notice by publication was given to possible creditors. Sarah A. Scaggs filed her claim, No. NH1. This was based on both certificates, Nos. 183 and 184, but No. 184 had not matured and she made no claim thereunder upon the hearing. The liquidator allowed the claim for \$6.00 only. Mrs. Scaggs filed objections (sixteen in number). The cause came on for hearing before the chancellor. Evidence was taken. The court entered a decree, January 14, 1944. The decree sustained the action of the liquidator and directed payment to Mrs. Scaggs of the \$6.00 she had theretofore refused. This appeal is by Mrs. Scaggs from that order.

The index to the abstract does not comply with Rule 6 of this court, in that it fails to indicate the nature of each exhibit. This disregard of the rule has added much to the labors of the court.

The claimant says the findings of the decree are contrary to the law and the evidence. Certificate No. 183 was received in evidence. Proof was made of the payment of assessments on it and of the death of Dr. Scaggs on December 4, 1939. It was also shown that proofs of his death were filed with the insurance company at Chicago. This was prima facie sufficient to establish liability under the policy.

The decree, however, finds that the certificate "issued to Dr. A. Scaggs, was cancelled for non-payment of assessment levied for the months of July, 1939, and August, 1939, and was reinstated upon application for reinstatement made by Dr. A. Scaggs and received by the New Home Benefit Association on August 29, 1939; that in and by said application for reinstatement said Dr. A. Scaggs made representations and warranties to the New Home Benefit Association that he was then in good health, and that in consideration of said repre-

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of the books, "The Book of the Dead,"

Washburn, D. C. (1989). The effects of the 1980s on the U.S. economy. *Journal of Applied Social Psychology*, 19, 1-10.

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SECRET

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TABLE 1. *Estimated and observed values of the parameters of the model for the 1995-1996 season*

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Journal of Management Education 30(6)p. 789-804

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CONCLUSIONS OF THE NATIONAL BUREAU OF STANDARDS
AND IS NOT TO BE USED TO PROMOTE OR VETO ANY
SPECIFIC PRODUCT, TRADE NAME, OR COMPANY

...re: 100

SECRET

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

REPORTED FOR THE FIRST TIME IN 1957, THIS IS BEING SENT TO

Nov 10 1964

by the New York Society for the Prevention of Cruelty to Children, Inc. (NYSPCC), dated in New York, New York, 1961, and dated in New York, New York, 1961.

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estations and were applied to the following Association:

...to hold together at least in the future in good health.

representations and warranties said Certificate No. 183 was reinstated; that the representations and warranties made by said Dr. A. Scaggs in and by said application for reinstatement were false and fraudulent, and that ^{by} reason thereof said reinstatement of certificate No. 183 was void and ceased to be of any force and effect after the last day of July, 1939; that claimant is not entitled to any of the benefits provided by said certificate No. 183 * * *."

The findings of the decree are inaccurate and not sustained by the evidence. The notices of the assessments made for July and August, 1939, are in evidence. These notices state as to each assessment that it is payable within thirty days of the date of the notice. The undisputed evidence shows that the assessment for both months was paid on August 28 of that year and receipt of the payment was acknowledged by the Association the next day, August 29. The August payment was, therefore, made within the time named in the notice. The July payment was not paid within such time. This fact, however, did not subject the certificate to cancellation in the absence of further action on the part of the Association, which was a condition precedent to such cancellation. The Illinois Insurance Code, Chapter 73, Sections 942 and 945, provides:

"Upon failure of any member to pay any assessment levied upon him pursuant to the provisions of this article, within the time named in such notice, the association may declare the certificate of such member cancelled upon a further notice sent by first class mail addressed to such member at his last known post office address stating that his certificate will be cancelled if payment is not made to the association within ten days of the mailing of such cancellation notice."

The by-laws contained a similar provision. There is not a scintilla of evidence in the record that any such notice of cancellation was ever mailed to the insured for any cause. The records of the company are in the possession of the liquidator. If any such notice had been given the proof was easily available.

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It was not produced. The record shows that an official of the Insurance Department, having complete knowledge, on oath says that the insurance company officials manufactured untrue evidence in order to deprive these insured (the Scaggs) of their rights.

However, there is in evidence an exhibit (the liquidator's No. 1) which tends to show Dr. Scaggs was induced to believe certificate No. 183 had lapsed and that he signed an application on August 29 for reinstatement. This paper is on a printed form apparently used by the Association. It is designated "Application To New Home Benefit Association For Reinstatement Of Lapsed Certificate". It states that certificate No. 183 has lapsed. In an appropriate place at the end is the signature "A. Scaggs"; underneath in printing "Signature of Applicant". In the body of the instrument the signer states that his occupation is "Practice of medicine", in another blank that he was born "July 5, 1871". These two blanks are filled in in the handwriting of the insured. Before his signature at the end of the document and before both these statements in his handwriting are cross-marks in ink and evidently in the handwriting of another. The paper is dated August 29, 1939. There is an appropriate blank on it for the signature of a witness, but no name appears therein. These crosses indicate the paper was not executed at Chicago at the time stated on its face and that it was probably executed at another place and returned by mail. However, no proof was offered as to how this writing was delivered to the insurance company. It may have been sent to an agent of the company at Dr. Scaggs' home in Lovington, his writing obtained thereon and then returned by the agent to the company. In the printed form the insured states: "That since the date of application for the above numbered certificate I have had no sickness, ailment or injury whatsoever, nor have I been attended by any physician, except as follows:" The answer, in the handwriting of an unknown person, is: "No exceptions". In

another part of the printed form the applicant is supposed to state: "That during the past twelve months, I have not been associated with a person who has consumption or any infectious or contagious disease, nor have I been living or staying in a dwelling occupied during said period by such a person except as follows." The answer to this, in unknown handwriting, is: "No Exceptions". By the printed form the insured further states: "I hereby make this application for reinstatement a part of the certificate and agree that in the event of self-destruction, whether sane or insane, within two years from the date of approval by the New Home Benefit Association of this application, the amount payable as a death benefit under said certificate shall be equal to the assessments paid since reinstatement on said certificate and no more". In the paper as offered in evidence the letter "S" is stricken out of the word "years", the printed word "two" is stricken out and in the handwriting of an unknown person (but certainly not Dr. Scaggs) is written the word "one".

The claimant objected to this paper when it was offered in evidence. It was received subject to objection and the decree seems to be based upon its validity. When it is recalled that the original certificate was issued without medical examination and that both statute of the State and by-law of the insurance company required a ten day notice by registered mail before any cancellation of a certificate, the paper indicates an attempt to perpetrate a palpable fraud on the insured, such as is described in the original complaint filed. The trembling hand with which Dr. Scaggs wrote that part of this paper which was written by him indicates a design on the part of whoever obtained his signature to deprive his widow of the benefits of the insurance he had been carrying for many years.

There are two significant items of evidence in the record in this connection. First, the check of August 28, 1939, by which Dr. Scaggs paid the assessments on both certificates for July and

8.

August. At the top of the check is a memorandum in his handwriting: "Duplicate for check drawn 8-1-39", and at the bottom, in a blank following the printed word "For", this, also in the handwriting of Dr. Scaggs: ("Duplicate check 8-1-39, which has not shown up at bank".) This check was accepted by the insurance company and cashed. Second, under date of 8-28-39, Dr. Scaggs wrote the insurance company at Chicago:

"Sirs:-

After having written you twice since I sent you a check on Aug. 1, 1939, amount six dollars to pay assessments on Ctfs. 183 & 184, I am sending you a duplicate and cancelling at bank of original.

I sent you a self addressed, stamped envelope for reply some days ago and not received the reply.

If you have any doubts about the check having been issued at the time I can send you my book of stubs and blanks left.

We are both in our usual state of good health.

Hoping to hear from you soon I remain,

Yours truly,

A. Scaggs."

There are other reasons why this decree cannot stand. The finding is that the insured obtained reinstatement by fraudulent representations. There is not sufficient proof of this in the record. In the first place there is no proof that the insurance company relied upon these representations, and in the second place there is no proof that if they had relied thereon the same were false in material matters when made. The liquidator offered no evidence on this issue but relied upon statements in the proof of death submitted by the claimant. This statement is signed by Dr. Stephen H. Ambrose of Lovington, Illinois, who states that the duration of the last illness of Dr.

9.

Scaggs was from 12:30 A. M. to 1:00 A. M. of the day he died. The proof states that the deceased had had an operation for hernia in 1935 and cardiac decomposition in 1936 and that there was recovery from both in 1936; that the disease of which he died first began to affect his health only thirty minutes before his death, and that in the opinion of the attending physician no former disease had any effect upon his last illness. The attempted fraud in this case is by the insurance company instead of Dr. Scaggs.

Claimant insists the order should be reversed with directions to allow her claim for \$1,000.00, plus interest from the date of proof of loss. This will be done.

For the reasons stated the decree will be reversed and the cause remanded with directions to allow the claim under certificate No. 183 for \$1,000.00, plus interest at five per cent from the date of proof of loss, December 26th, 1939.

REVERSED AND REMANDED WITH DIRECTIONS.

Niemeyer, P. J., and O'Connor, J., concur.

George was from 11:00 A.M. to 1:00 P.M. on the day he died. The
proof states that the body of George was found in position for burial
in 1935 and certified death certificate in 1936 that there was
recovery from this illness; that the cause of death he died
first began to show in 1935 and that the illness before his
death, and that in 1935 for the first time he died in no
former disease was any other than a heart disease. The certificate
issued in 1936 in the case of George was signed by Dr.

George.

Claimant (George) was born in 1900 in Chicago, Illinois. He
claims to have been a resident of Chicago, Illinois, from the
date of birth of George, and that he was born in Chicago.
For the purpose of this case, the certificate of birth and
the cause of death certificate are the only evidence
submitted in this case. The certificate of birth was issued
from the date of birth of George, and the cause of death
certificate was issued from the date of death of George.

Witness, P. J. (George), 1936.

LIVE STOCK NATIONAL BANK OF
CHICAGO, Administrator of the
Estate of RUTH TAVENNER, De-
ceased,

Appellee,

v.

WALTER J. CUMMINGS, as Receiver
etc., et al., doing business as
CHICAGO SURFACE LINES,
Appellants.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

3241A 312

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action under the statute, against defendants to recover for the wrongful death of Ruth Tavenner, deceased, which plaintiff claimed resulted from a collision between an automobile in which Mrs. Tavenner was riding, and one of defendants' street cars. There was a jury trial, a verdict and judgment in plaintiff's favor for \$5,000 and defendants appeal.

In the late afternoon of July 31, 1943, Mr. and Mrs. Tavenner, with their baby girl about 26 months old, were driving in their automobile, in Milwaukee avenue, which extends northwest and southeast, about a block north of Diversey Boulevard, Chicago. They were on their way to visit friends at Fox Lake, Illinois. Mr. Tavenner was driving and Mrs. Tavenner and the baby were sitting on the front seat with him. Another car going in the same direction was in front of the Tavenner automobile. It stopped and was backing into the right hand curb to park; this caused Mr. Tavenner to stop his automobile, and it was struck from the rear by one of defendants' street cars, as a result of which Mrs. Tavenner was injured. Plaintiff's contention is that as a result of the collision Mrs. Tavenner's right kidney was misplaced about 2 inches. That she received medical aid and complained from that time until August 24, 1943, when she was operated on at a hospital in Chicago and died the same day a very short time after the operation - that her

TO : DIRECTOR, FBI
FROM : SAC, NEW YORK (100-100000)
SUBJECT: [REDACTED]
RE: [REDACTED]

[illegible]

death resulted from the collision. On the other side defendants' theory is "that the fallen kidney was not caused by the collision."

The evidence is to the effect that the deceased was 31 years old; had been married for about 5 years to Edward Tavenner, who was a machine shop foreman. That as a result of the marriage a daughter was born, who at the time of the accident was 26 months old. Prior to the accident Mrs. Tavenner was healthy, did her own housework, the cooking, cared for the baby, did laundry work and sometimes helped her husband with the painting and decorating of the walls and woodwork of their home. Her health was good; she had never been treated by a doctor other than when the baby was born. When the accident occurred she and the baby went with the police officer who came to the scene, to a doctor's office nearby. The doctor examined her and found a small blood tumor on the top of her head about the size of a quarter. Shortly afterward she and her husband and the baby continued on their way to Fox Lake, which is about 50 miles northwest of Chicago. They were to visit some friends over the week end. They arrived at Fox Lake about 9 o'clock at night. On the next day, which was Sunday, Mr. Tavenner left for his home in Chicago about 6:30 P.M., Mrs. Tavenner remaining with her friends at Fox Lake. On the next day, Monday, he received a telephone call from his wife and the next day he with Dr. Bernstein drove to Fox Lake where Mrs. Tavenner received medical attention from the doctor. On the following day, Wednesday, Mrs. Tavenner returned to their home in Chicago with her husband and the next day, Thursday, Dr. Bernstein called at their house where he examined her and shortly afterward had X-ray pictures taken of her. The doctor had not known the Tavenners before he went with Mr. Tavenner to Fox Lake. The X-rays showed that Mrs. Tavenner's right kidney was about one and one-half inches lower than the left kidney which the doctor diagnosed as a "ptosis displacement with a torsion" which he said was "a kinking or twisting." For a couple of

[illegible]

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weeks thereafter, Rose Kronkel, a woman friend, stayed at the Tavenner's home, apparently to help do the housework and take care of Mrs. Tavenner and about two weeks thereafter Mrs. Tavenner was taken to the Robert Burns Hospital, in Chicago. She was there 7 or 8 days and on August 24, was operated upon by Dr. Boland, assisted by Dr. Bernstein, and as stated, she died very shortly after the operation was completed.

There is further evidence in the record tending to show that from the time of the accident until Mrs. Tavenner was operated on she was complaining as a result of the collision between the automobile and the street car. Proof of Mrs. Tavenner's good health prior to the injury and the change occurring immediately afterward and continuing until her death is competent to establish that the subsequent condition resulted from the injury. Weil-Kalter Mfg. Co. v. Ind. Comm. 376 Ill. 48; Ivanhoe v. Buda Co., 247 Ill. App. 336.

Dr. Malcolm, called by defendants, admitted to practice surgery in Illinois about 1930, and who was a graduate of McGill University in Montreal, testified as an expert. He gave as his opinion, after the facts were detailed about the hypothetical person, that the displacement of the kidney could not have been the result of the collision. And further, that the operation performed on Mrs. Tavenner "is not done any more." He then detailed what he considered a proper method of treatment for a misplaced kidney.

We think the question whether the displacement of the kidney and the operation resulted from the injury Mrs. Tavenner received as a result of the collision was for the jury. And upon a consideration of all the evidence in the record we are of opinion we would not be warranted in disturbing the verdict of the jury, approved as it was by the trial judge, on the ground that it was against the manifest weight of the evidence.

Counsel for defendants, after describing the movement of the two automobiles and the street car, the collision and what the

weeks thereafter, the witness, Taverne, at the
 Taverne's home, advised the witness of the
 of Mrs. Taverne, who was the wife of the
 taken to the hospital, where she was
 3 days and 3 nights, and was
 by Dr. Taverne, who was the
 operation was successful.
 from the time she was taken to the
 she was confined to her bed, and
 mobile and was able to move about
 to the hospital, where she was
 continuing to receive treatment,
 request of the witness, who was
 Ind. Code, Sec. 12-1-1, which
 Taverne, who was the wife of the
 emergency in the hospital, and
 University in the hospital, and
 opinion, after the witness had been
 that the witness was the result
 of the collision, and that the
 Taverne did not know the witness
 a proper person to be the witness
 to think the witness was the
 and the witness was the result
 as a result of the collision, and
 tion of all the evidence in the
 not be warranted in stating the
 it was by the trial judge, and
 manifest weight of the evidence.
 Counsel for defendants, after
 the automobiles and the street car, the collision and that the

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motorman did to stop his car say: "Since the evidence bearing upon the question of negligence is in conflict, it does not afford a proper issue to be presented in this court. Therefore, it will not be necessary to go into detail in setting forth the evidence bearing upon that question."

Counsel complain of the action of the court in refusing to give defendants' offered instruction No. 25 and in giving plaintiff's instruction No. 1. By instruction No. 25 defendants sought to have the court tell the jury what they should take into consideration in considering whether the motorman properly operated the street car and continuing, that "plaintiff must show, by a preponderance of the evidence that the circumstances were such that said motorman had time and opportunity to become conscious, by the exercise of ordinary care, of the facts giving rise to such duty, and reasonable opportunity to perform it." And that if the motorman did not have a reasonable opportunity, by the exercise of ordinary care, to stop the street car, they should find for the defendants. We think other instructions pointed out what plaintiff was to prove by a preponderance of the evidence and what the duty of the motorman was and that the jury were not in any way misled. The issues were simple and easily understood by the jury. And under the circumstances we think the judgment ought not to be reversed for failure to give the offered instruction. Plaintiff's instruction No. 1 which was given, and to which complaint is made, after telling the jury what was alleged in the complaint, which was an unsworn statement of charges made by plaintiff and not to be considered as evidence, continued that if the jury believed from a preponderance of the evidence under the instructions of the court that plaintiff had proved the defendants were guilty of one or more charges of negligence as alleged in the complaint "and that such negligence, if any, caused or proximately contributed to cause the accident" and the injuries

5.

and death complained of, and that both Mr. and Mrs. Tavenner were in the exercise of ordinary care, then they might find the defendants guilty. Counsel for defendants say that this instruction is wrong because it directs a verdict for plaintiff if the jury find that the defendants were negligent "and that such negligence, if any, caused or proximately contributed to cause the accident and the injuries and death complained of in this case." That to warrant a recovery for the wrongful death such as the case at bar "The Injuries act provides for recovery only where the death was caused by wrongful act and not where the wrongful act was but a contributing cause, proximate or otherwise." And in support of this contention counsel cite Chase v. Nelson, Admr. 39 Ill. App. 53. That was a malpractice case by an administrator to recover for the death of a person which, it was claimed, resulted from unskillful treatment of the physician. Language was used by the court in that case which would tend to support counsel's contention, but upon a careful reading of the opinion we think it will be found that this was not the holding in that case. That was a case where the doctor was charged with being unskillful in an operation. The date when the operation was performed does not appear but the patient died September 11 [year not stated]. After discussing how the operation was performed, the court said there was no substantial controversy about that, except that the doctor insisted that the patient "was laboring under other serious and dangerous maladies at the time he was called." And in discussing the instruction which told the jury what plaintiff must prove before recovery could be had and then what the doctor did "that caused or contributed to the death" of the patient, the court said that the statute under which the action was commenced provided that "'whenever the death of a person is caused by the wrongful act, neglect or default of another' then such person who caused the death shall be liable, etc." We think the court did not quote

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and death certificate (2), and that the doctor, Dr. [redacted],
 were in the hospital at the time of the death of the patient.
 defendant's wife, [redacted], who is the mother of the child,
 is wrong because it is not the fact that the child died at the time
 that the defendant was in the hospital, but that the child died
 any, caused a death of the child, and that the defendant was
 the father of the child, and that the child died at the time
 a recovery for the child was made, and that the child died at the time
 injury to the child was made, and that the child died at the time
 by wrongful act and omission of the defendant, and that the child died
 thing cause, and that the child died at the time of the death of the
 action against the defendant, and that the child died at the time of the
 and a malpractice case, and that the child died at the time of the
 of a person, and that the child died at the time of the death of the
 want of the defendant, and that the child died at the time of the
 which would be a wrongful act and omission of the defendant, and that the
 reading of the child's death certificate, and that the child died at the
 the holding in that case, and that the child died at the time of the
 charged with the death of the child, and that the child died at the
 operation was performed, and that the child died at the time of the
 If [redacted] was not the father of the child, and that the child died at the time
 of, the court will find that the child died at the time of the death of the
 except that the doctor [redacted] was not the father of the child, and that the child died at the time
 other parties and that the child died at the time of the death of the
 in [redacted] the defendant, and that the child died at the time of the death of the
 grows before recovery could be had and that the doctor did
 "that caused or contributed to the death of the patient, the court
 said that the doctor [redacted] was not the father of the child, and that the child died at the time
 that "wherever the death of a person is caused by the wrongful
 act, neglect or default of another, and that person who caused
 the death shall be liable, etc." It seems to me that the doctor

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enough of section 1 of the Injuries act. The pertinent part of that section is: "Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages."

In the instant case if Mrs. Tavenner had survived and brought suit against the street car company for damages and should show to the satisfaction of the jury that she was guilty of no negligence but that the motorman was negligent, she would be entitled to recover. But since she died, the statute gives the right of action to her administrator.

The court reversed the judgment in the Chase case on the ground that there were other erroneous instructions given at plaintiff's request and a proper instruction offered by defendant refused. Moreover, in the instant case, an instruction was given at defendants' request which told the jury that "It is not sufficient for the plaintiff to show that any alleged injury contributed to or helped to bring about her death. Before the plaintiff can recover in this case it must show that the death of the plaintiff's intestate was the direct result of the alleged injuries."

We think the giving of instruction No. 1 is not reversibly erroneous even if it be held that it was technically inaccurate.

The judgment of the Circuit court of Cook county is affirmed.

AFFIRMED.

Niemeyer, P. J., and Matchett, J., concur.

enough of section 1 of the Insurance Act. The defendant says of that
section is: "Whenever the defendant shall be caused by
wrongful act, neglect or default of the plaintiff, or of any person
acting on behalf of the plaintiff, to incur any loss or expense, the
plaintiff shall be liable to indemnify the defendant for such loss or
expense, and to pay the costs of the action." The defendant says that
this section is not applicable to the facts of this case, and that
the plaintiff is not entitled to recover.

In the judgment of the court, the plaintiff is entitled to recover.
The defendant's contention that the plaintiff is not entitled to recover
is not supported by the facts of the case. The plaintiff has shown
that the defendant is liable to indemnify him for the loss and
expense incurred by him in the course of the action. The defendant
has failed to show that the plaintiff is not entitled to recover.
The court has therefore granted the plaintiff's claim for damages.

The court has also granted the plaintiff's claim for costs.
The defendant has failed to show that the plaintiff is not entitled
to recover his costs. The plaintiff has shown that the defendant is
liable to pay the costs of the action. The court has therefore
granted the plaintiff's claim for costs. The defendant has failed
to show that the plaintiff is not entitled to recover his costs.
The court has therefore granted the plaintiff's claim for costs.
The defendant has failed to show that the plaintiff is not entitled
to recover his costs. The plaintiff has shown that the defendant is
liable to pay the costs of the action. The court has therefore
granted the plaintiff's claim for costs. The defendant has failed
to show that the plaintiff is not entitled to recover his costs.
The court has therefore granted the plaintiff's claim for costs.

The judgment of the court is that the plaintiff is entitled to
recover his damages and costs. The defendant has failed to show
that the plaintiff is not entitled to recover. The court has
therefore granted the plaintiff's claim for damages and costs.
The defendant has failed to show that the plaintiff is not entitled
to recover his damages and costs. The plaintiff has shown that the
defendant is liable to pay the costs of the action. The court has
therefore granted the plaintiff's claim for costs. The defendant has
failed to show that the plaintiff is not entitled to recover his costs.
The court has therefore granted the plaintiff's claim for costs.

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PEOPLE OF THE STATE OF ILLINOIS,
ex rel., GENEVIEVE CHRISTNER,
Appellant,

v.

W. J. HAMILTON, et al.,
Appellees.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

32-11A-612

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the relator, Genevieve Christner, seeks to reverse an order entered by the Circuit court of Cook county quashing the writ of certiorari issued upon her amended petition to secure a review of the record of the Oak Park Board of Education District No. 97 and that of the Appeal Committee appointed by the County Superintendent, Noble J. Puffer.

October 21, 1943, the relator filed her petition against the Superintendent of Schools and the members of the Board of Education of School District No. 97, of Oak Park, Illinois, in which she alleged that she was a single woman and was employed as a teacher in an Oak Park school in 1931 and continued to teach until the end of the school year of 1943 when the Board refused to renew her employment on the ground that on July 23, 1933, she had married a blind lawyer, and kept the matter a secret from the school officials. She alleged that this marriage was known to people generally in Oak Park and Chicago, and to the school officials of Oak Park. That she did not conceal the fact of her marriage and prayed that a writ of mandamus issue commanding the Board to reinstate her.

Defendants in their answer averred that it was the policy and rule of the Board for many years not to employ as regular teachers married women; that the relator concealed the fact of

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teachers married women; that the relation concerned the fact of and rule of the Board for many years not to employ as regular Defendants in their answer averred that it was the policy Board to reinstate her.

marriage and prayed that a writ of mandamus issue commanding the State of Oak Park. That she did not conceal the fact of her people generally in Oak Park and Chicago, and to the school officials. She alleged that this marriage was known to had married a blind lawyer, and kept the matter a secret from her to renew her employment on the ground that on July 22, 1933, she until the end of the school year of 1933 when the Board refused a teacher in an Oak Park school in 1931 and continued to teach which she alleged that she was a single woman and was employed in Education of School District No. 1, of Oak Park, Illinois, in the Superintendent of the Board of the Board of the Board of reverse an order entered by the Board of Oak Park court By this it was held that the Board's action was not to

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her marriage and the Board was not advised of it until 1943; that there was a hearing before the Board of Education which found against the relator and she appealed to an Appeal Committee where the matter was considered, with a like result.

December 27, 1943, by leave of court, the relator filed an amended petition praying that a writ of certiorari issue directed to the Board of Education, the County Superintendent of Schools and the Appeal Committee to certify the record to the Circuit court. Substantially the same allegations are made in this petition as in the original petition which prayed for a writ of mandamus. There was a hearing before the court and on April 19, 1944, an order was entered which recites that the matter came on to be heard upon the return to the Appeal Committee filed to the writ of certiorari, and the court having heard arguments of counsel, oral and written, and having examined the return filed by the County Superintendent of Schools for the Appeal Committee, found that the Appeal Committee had jurisdiction of the parties and of the subject matter and it was ordered and adjudged that the writ of certiorari bequashed and the petition dismissed. The relator appeals.

The reply brief of counsel for the relator was filed December 26, 1944.

There are over 700 pages in the transcript of record which shows the rules of the Board of Education of Oak Park; the minutes of the meetings of the Board in reference to the matter of severing the relator's position as teacher in the schools of Oak Park; the testimony of a number of witnesses; the appeal taken by the relator and the hearing before the Appeal Committee of the three appointed by the County Superintendent of Schools, viz., Herbert B. Mulford, Chairman, Minnie Rio and Ira Garman. The Committee rendered its opinion in which they said: "The Appeal Committee is of the opinion that the paramount interest to be considered in the operation of public schools SHOULD be the education and welfare of

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her marriage was the subject of a bill in 1911; that there was a bill introduced in 1912 which found fault with the bill of 1911; and that where the bill of 1911 was passed, it was passed in 1912.

There is a bill introduced in 1913, and an amended bill introduced in 1914, and the bill of 1914 is the bill of 1913 and the bill of 1913 is the bill of 1912.

There is a bill introduced in 1915, and an amended bill introduced in 1916, and the bill of 1916 is the bill of 1915 and the bill of 1915 is the bill of 1914.

There is a bill introduced in 1917, and an amended bill introduced in 1918, and the bill of 1918 is the bill of 1917 and the bill of 1917 is the bill of 1916.

There is a bill introduced in 1919, and an amended bill introduced in 1920, and the bill of 1920 is the bill of 1919 and the bill of 1919 is the bill of 1918.

There is a bill introduced in 1921, and an amended bill introduced in 1922, and the bill of 1922 is the bill of 1921 and the bill of 1921 is the bill of 1920.

There is a bill introduced in 1923, and an amended bill introduced in 1924, and the bill of 1924 is the bill of 1923 and the bill of 1923 is the bill of 1922.

There is a bill introduced in 1925, and an amended bill introduced in 1926, and the bill of 1926 is the bill of 1925 and the bill of 1925 is the bill of 1924.

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the children.

"We believe it was unreasonable for the Board of Education of School District #97 in Cook County, Illinois to deny Genevieve Christner Wilcox her contract merely because of a change in her marital status. There is no evidence to the effect that the change in her marital status affected her ability to teach or that it affected her rating as a good teacher. The concealment of her marriage and the deception practiced are the direct result of the policy of the Board and her human desire to hold her position under the circumstances.

"However, we further believe the question of employment of single or married teachers or both at present is a matter of policy to be determined by home rule. Under the present law, only the citizens of a School District can - if they so desire - change the policy of the Board.

"We believe it is beyond the scope and power of our official duties to disturb the home rule principle; therefore, under the circumstances and in the opinion of the Appeal Committee, we feel we have ^{other} no/alternative but to hold that the Employing Board was the duly authorized agency of the Citizens of the School District and legally had the authority and power to render its decision."

The trial judge in deciding the case said: "Genevieve Christner was a teacher in the Oak Park grammar schools. She became a teacher in 1931, but in 1943 the Board of Education, through its superintendent, caused charges to be filed against her, and the effect of the charges was that she did not truly answer certain questions with reference to her employment as a teacher; that in effect she deceived the Board." That in Oak Park there was a rule prohibiting employment of married women as teachers; that "There are two versions of this rule; one, referred to as Rule 99, reading as follows: 'Married women are not eligible for regular teaching positions in the elementary schools of Oak

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Park. They may be employed in substitute service. A woman teacher who is married during the school year may continue to teach for the balance of the school year upon the basis of a substitute teacher, and shall receive the salary paid to substitute teachers." And continuing the court said there was a grave question in his mind as to whether this rule was in effect, but that this question was immaterial because there was a prior rule which reads: "In the selection of teachers for employment in the Oak Park Elementary Schools first consideration will be given to applicants who have had successful teaching experience in addition to the required professional training. In making appointments to regular positions in the teaching force, first consideration will be given to women who are unmarried." That "there is no question but what the rule was in effect." That Miss Christner was married in 1933 to Earl Wilcox, a lawyer practicing in Chicago who lived in Austin, located on the west side of Chicago close to Oak Park; that Mr. Hamilton, Superintendent of Schools, testified that no married women are employed as regular school teachers in Oak Park but only as extra teachers. That "Miss Christner, for seven or eight years was known as Genevieve Christner, although her real name was Mrs. Genevieve Wilcox." That this was not contrary to the law of this State so long as it did not tend to defraud, "but, I think, in this case Miss Christner wanted to keep, at least partly, secret the fact she was married. In a conversation in 1938 with Superintendent Hamilton, he testified that when he asked her if she was married she said 'We plan to be.'" That "she kept on teaching, and she was a good teacher, and she led a good, respectable moral life." That all of the trustees of Oak Park found her guilty except one, although the one says that she did not tell the people of Oak Park that she was married. The court then discusses the law with reference to taking an appeal from the action of the Board of Education and says that the Appeal Committee was appointed by Mr. Puffer, County Superintendent of

Part. They say he was in the school for a while, a woman
teacher who is married and has a family, and she continues to
teach for the school. The school is in the town of
substitute teacher, and she is not allowed to substitute
into school. The school is in the town of
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did not tell the people of the Park that she was married. The
court then discusses the law with reference to taking an oath
from the action of the school of education and says that the school
Committee was appointed by Mr. Folger, County Superintendent of

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Schools of Cook county, and that at the request of the relator the Appeal Committee proceeded to hold a hearing as the statute provided. He then refers to the opinion of the Appeal Committee, which we have above quoted, and after discussing some authorities refers to the school law - section 127-3/4, ch. 122, Ill. Rev. Stat. 1943, and continues: "I hold that the Appeal Committee had jurisdiction of the parties and of the subject matter. It was on the request of the petitioner, Mrs. Wilcox *** she brought the review before the County Superintendent of Schools' Committee." And he affirmed the decision of the Appeal Committee.

Counsel for the relator in their brief say, "the only questions at issue were: (1) Did the Board, principals, superintendent and others know that she was a married woman when the Board placed her under tenure on May 22, 1942? (2) Did the Board in quorum assembled ever adopt a rule prohibiting a teacher from getting married? (3) Was a teacher prohibited from using her maiden name in her professional capacity subsequent to her marriage?"

On the original hearing before the school officials in Oak Park, it was found that the Board did not know the relator had been married and that she had concealed the fact of her marriage from the officials. The Appeal Committee approved this finding. If we had authority to pass on this question, which we have not, we think (1) no other finding could be sustained under the evidence; (2) the record further discloses that for many years there was a rule in force in School District #97 which provided that in making appointments of teachers to regular positions first consideration would be given to women who are unmarried. This fact is shown by the record and is sustained by the Board of Education, the Appeal Committee and the trial judge. The trial judge, in deciding the case said he was uncertain whether Rule 99 was properly adopted by the School Board officials in Oak Park in 1943, which provided that married women were not eligible for regular teaching positions

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Schools of Cook County, and that the purpose of the meeting
the Appeal Committee proposed to hold, which is the subject
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Council, and the names of the members of the Appeal Committee
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Board of Appeal, and the names of the members of the Appeal Committee
Board is to be a body of five members, and the names of the members of the
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Committee and the Appeal Committee, and the names of the members of the Appeal Committee
case said he was uncertain whether this was properly adopted
by the School Board officials in New York in 1945, which provided
that married women were not eligible for regular teaching positions

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in the elementary schools in Oak Park. But the prior rule, which we have above quoted and which had been in effect many years, was sufficient authority for excluding married women as teachers in Oak Park schools. We agree with the holding of the trial judge. (3) There was no prohibition, so far as we are able to find, by which a married teacher was prevented from using her maiden name, provided such use was not for the purpose of deceiving the school officials. But in the instant case, the finding is that the use by the relator of her maiden name was for the purpose of deceiving the school officials. While this disposes of what counsel say are the only three questions at issue, a great deal of other argument is made on several contentions touching the alleged irregularity of the hearings by the Board of Education and the Appeal Committee, and the constitution of that committee. We think there is no merit in these several contentions and on the whole it is clear that the relator was given a fair hearing before the Board of Education and the Appeal Committee and that none of her rights were violated.

Par. 136c, ch. 122, which applies to the school in Oak Park, provides for "Contractual continued service for teachers" (which is referred to as the "tenure" statute) and for the method of removal of such teachers. The section provides: "Notwithstanding the entry upon contractual continued service, any teacher may be removed or dismissed for the reasons or causes provided in Sections 115 and 127 of this Act, in the manner hereinafter provided."

By section 115 the board of school directors is authorized "To dismiss a teacher for incompetency, cruelty, negligence, immorality or other sufficient cause." Any by section 127: "To dismiss and remove any teacher, whenever, in the opinion of the board of education, he is not qualified to teach, or whenever, in the opinion of the board, the interests, of the schools may require it."

Par. 136c (sec. 127-3/4) after providing for^{the} manner of hear-

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ing and discharge by the Board of Education and the dismissal of a teacher continues: "If, after the hearing, the teacher desires to appeal from the decision of the board, said teacher must notify the county superintendent in writing, within ten days after the decision, stating a desire to have the case reviewed by an appeal committee. The appeal committee shall be appointed by the county superintendent of schools and shall consist of three members, none of whom shall be a resident of the district in which the teacher teaches. One of the members shall be a public school teacher, one a school board member, and the third, who shall act as chairman, shall be neither a teacher nor a board member." The only proof that the three persons appointed were not such persons as the statute authorized is the allegations of the relator's petition for writ of certiorari. There is no proof in the record that we have been referred to which in any way shows that either of the three members were not properly appointed. We think it clear that each of the three gave the relator a fair and impartial hearing although, as they stated in their decision, they were not personally in favor of the rule prohibiting married women from teaching in the schools of Oak Park, yet their decision was not in her favor.

Authorities are cited holding that the dismissal of a teacher because of becoming married is not in violation of a statute giving boards the right to dismiss teachers for reasonable cause. Richards v. District School Board, 78 Ore. 621; School City of Elwood v. State, 203 Ind. 626. Each of these cases was overruled by the same court, Hendryx v. School District, 148 Ore. 83; McQuaid, et al. v. The State ex rel., Sigler, 211 Ind. 595. On the other side, a number of authorities are cited which hold that a rule against employing married teachers in schools is valid. Sheldon v. School Comm. of Hopedale, 276 Mass. 230;

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Rinaldo v. School Comm. of Revere, 294 Mass. 167; Coleman v. School District, 87 N. H. 465; Ansorge v. City of Green Bay, 198 Wis. 320; and in State ex rel. Ging v. Board of Education, 213 Minn. 550, it was held that in reviewing the determination of a school board, whether a statutory ground for discharging a tenure teacher exists, the jurisdiction of courts is limited to questions affecting the regularity of its proceedings, and, as to the merits, whether the determination was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous authority of law, or without any evidence to support it. And that where a tenure teacher was discharged because the position was discontinued, or for lack of pupils, the one to be discharged was for the board to determine as an administrative question and the board's decision was final.

No Illinois case has been cited on this question but under the provisions of sec. 127-3/4 of the school law we think the rule of the Board of Education, as above stated, which provides that married women should not be employed as teachers is valid. Under the record in this case we are not warranted in reversing the order of the Circuit court of Cook county appealed from, and it is affirmed.

ORDER AFFIRMED.

Niemeyer, P. J., and Matchett, J., concur.

CONTINENTAL ILLINOIS NATIONAL BANK
AND TRUST COMPANY OF CHICAGO, as
Executor and Trustee under the Last
Will and Testament, and Codicils
Thereof of HENRY EDWIN SEVER, Deceased,
Appellee,

v.

FRANKLIN P. SEVER (JOEL W. SEVER, H. A.
SCHUETZ and TOM B. BROWN as Executors
of the Estate of FRANKLIN PIERCE SEVER,
Deceased), THOMAS E. BROWN, CORDELIA
BROWN, JOHN G. BROWN, JR., WILLIAM A.
BROWN, AMELIA X. BROWN WOEFEL, HERBERT
WOODCOCK, AMY WOODCOCK, FRANK WOODCOCK,
TOMMY WOODCOCK, PAULVILLE LODGE A. F. &
A. M. OF BRASHEAR, MISSOURI, ROCK CREEK
CEMETERY, HIRAM LODGE OF KAHOKA, CEMETERY
AT KAHOKA, TOWN OF KAHOKA, THE CHICAGO
PARK COMMISSIONERS, ROBERT J. DUNHAM,
PHILLIP S. GRAVER, STEPHEN I. WITMANSKI
and JAMES C. PETRILLO, TRUSTEES OF CHI-
CAGO PARK DISTRICT, THE BOARD OF TRUSTEES
OF THE MOTHER CHURCH-THE FIRST CHURCH OF
CHRIST SCIENTIST, JOEL W. SEVER, DR. H. A.
SCHUETZ, JOHN E. O'DONNELL, FRANK BROSN
and WILLIS WOODCOCK, as Trustees of the
Sever Forest Preserve of Knox County, Mis-
souri,

LEWIS C. MURTAUGH, Trustee of the inter-
ests of all persons not in being, who may
become entitled to, or may, upon coming
into being, claim to be entitled to any
future interest, legal or equitable, whether
arising by way of remainder, reversion, pos-
sibility of reverter, executory devise upon the
happening of a condition subsequent or other-
wise, in any of the trust property involved
herein,

IMPLEADED WITH HANNIBAL-LA GRANGE COLLEGE, St.
LOUIS UNIVERSITY,

Appellees,

v.

THE WASHINGTON UNIVERSITY,

Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the Washington University seeks to reverse
a decree of the Superior court of Cook county entered June 14, 1944,

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by the terms of which approximately \$1,250,000, the residue of the estate of Henry Edwin Sever, deceased, was awarded to the St. Louis University, located in St. Louis, Missouri.

June 3, 1942, plaintiff, the Continental Illinois Bank and Trust Company, of Chicago, as executor and trustee under the last will and testament and codicils of Henry Edwin Sever, deceased, filed its complaint in chancery for the construction of the will and two codicils, of Henry Edwin Sever, deceased, and for other relief, in which it was alleged that he died April 8, 1941, a resident of Cook county, Illinois; that his will and two codicils were admitted to probate by the Probate court of Cook county, Illinois, May 22, 1941. The will was dated June 5, 1925, the first codicil, November 9, 1937, and the second codicil, March 28, 1941. That the deceased left him surviving a number of heirs; that an inventory and supplemental inventory had been filed in, and approved by the Probate court of Cook county; that 14 of the legatees mentioned in the will had been paid their respective legacies in full; that the value of the residue of the estate was estimated to be approximately one million dollars. That the will established a trust fund of \$5,000, the income of which was directed to be paid semi -annually to the Paulville Lodge A. F. & A. M. of Brashear, Missouri, to be used in enlarging and beautifying a cemetery located nearby and for the care of the graves of Mr. Sever's father and mother and other relatives who were buried there. There were other allegations in reference to the provisions of the will as to this fund, that under the laws of Illinois it was not lawful to establish a trust in perpetuity, etc., and that the court should construe this provision of the will so that the plaintiff bank, the executor and trustee, would be advised as to what its duties and obligations were.

There are further allegations of the complaint in reference to a \$100,000 gift for the erection of a library and the purchase of books to be located in Kahoka, Missouri, and the decree of the court

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[illegible]

books to be located in Khabarovsk, Ussuriysk, and the decree of the court to a \$100,000 gift for the creation of a library and the purchase of There are further allegations of the consular in reference

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is asked for the construction of this provision of the will, and advice. Further allegations of a similar character are made as to a trust fund of \$100,000 mentioned in the will for the purpose of establishing a forest preserve and game refuge to be known as the Sever Forest Preserve, to be located in Knox county, Missouri. That \$25,000 was bequeathed to the Chicago Park Commissioners for the purpose of erecting a carillon in Grant Park to be known as the Sever Carillon. A construction of the will and for advice, was asked.

And it was further alleged that by Paragraph F, of the 11th article of the first codicil it is provided that the residue of the testator's estate should be used for the purpose of establishing an educational institution in Missouri to bear the name of the deceased; that for this purpose the testator thought a corporation should be formed and a board of directors named, and the fund turned over to them to administer but not until the location had been selected and the building erected, equipped and ready for use; that the location is left to the discretion of the plaintiff bank, the trustee, to be determined by inducements that may be offered and as the need may appear; that the institution should be along the lines of technology with a view to better equipping young men and women in performing the world's work and that the Boston "Tech" of Boston, or the Rice Institute of Huston, Texas, were examples of what the testator had in mind; that the town of Kirksville, Missouri, may be considered by the trustees as a proper place in which the school might be located, being the town in which the testator and other members of his family had received their early training; that should the State of Missouri see fit to take over and operate the institution, the trustee was authorized to turn the fund over to the state if in its judgment this would further the purposes for which the institution was to be established.

The meaning of this paragraph involves the principal question on this appeal, and the trustee asks the aid of the court as to its

is asked for the construction of this portion of the will, and
advice. Further allegations of a gift or otherwise are made as
to a trust fund of \$100,000 retained by the will for the purpose
of establishing a forest preserve and land to be known as the
Sever Forest Preserve, to be located in Knox County, Missouri,
\$25,000 was bequeathed to the trustees to be used for the
purpose of erecting a building in which to hold the same as the
Sever Forest Preserve, a non-profit corporation, was used.
And in the further allegations it is alleged that the trustee of
article of the trust agreement is to be known as the trustee of
the testator's estate and is to be known as the trustee of the
an educational institution in which to hold the same as the
deceased; that for this purpose the trustee is to be known as the
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lines of technology with a view to the education of young men and
women in performing the duties of the testator's estate, and the
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what the testator had in mind; that the trustee of the testator's
Missouri, may be considered by the trustee as a proper place in
which the school might be located, being the town in which the
testator and other members of his family had received their early
training; that should the State of Missouri see fit to take over
and operate the institution, the trustee was authorized to turn the
fund over to the state if in its judgment this would further the
purpose for which the institution was to be established.

The meaning of this paragraph involves the principal question
on this appeal, and the trustee asks the aid of the court as to its

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duties, the amount the trustees should expend for a building and equipment and endowment; and the court should advise the trustee what inducements it needs to consider in determining the location of the institution and whether "it may be combined with or, be a part of another institution, and may advise as to the nature, types and kinds of technology to be taught." And it is alleged that due to the war emergency and to the shortage of materials it may be difficult or impossible to erect the buildings for several years and advice of the court is asked as to how the plaintiff trustee might invest the funds during this period.

A number of parties, including the Attorneys General of Illinois and Missouri are made parties to the suit. Answers were filed by the several defendants including the Attorney General of Illinois and the Attorney General of Missouri, as was also the answer of Lewis C. Murtaugh, trustee of the interest of all persons not in being.

July 7, 1943, a decree was entered which recites in the usual way, the pleadings, and finds that Henry Edwin Sever executed his will and two codicils on the dates as above stated and each of them is made a part of the decree. Then follow a number of findings in reference to the various bequests; that Kahoka, Missouri had accepted the gift of \$100,000 for the library and equipment and had conformed with other requirements of the will. And it was decreed what the trustee's duties were.

As to paragraph F of article 11 of the first codicil, the decree finds that the plaintiff bank is made trustee of the residue of the estate which is "to be used for the purpose of establishing an educational institution along the lines of Technology in the State of Missouri, to bear his name, and the location of said educational institution in that state is left to the discretion of the Trustee, to be determined by the inducements that may be offered

business, the amount the trustees should receive for a building and
equipment and improvements. It is not to be understood that the trustees
what inducements it would be necessary to offer to the location
of the institution and what amount it would be required to pay, as a
part of another institution, or to the trustees, types
and kind of technology. It is not to be understood that
due to the fact that the trustees are not to be held liable for
be different or less than the amount of the gift. It is not to be
years and advice of the court in the matter of the gift.
trustees might invest the money in the same manner.
A number of other factors, such as the location of
Illinois and Missouri, are to be taken into consideration. The trustees
filed by the several defendants. The trustees are also the an-
Illinois and the Missouri trustees, and the trustees of the an-
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State of Missouri, to bear his name, and the location of said edu-
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Trustees, to be determined by the inducements that may be offered

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and as the need may appear; that said educational institution may be an institution already existing and operating in the State of Missouri; that it is presently impracticable to make appropriate and proper selection of a location for such educational institution" due to the war and to the consequent shortage of materials and that it may be impossible to erect a new building for that purpose for several years; that until the residue can be applied as directed by paragraph F of the first codicil, it should be held by the trustee as a trust fund and be invested by the trustee in securities authorized as investments by trustees. That "this Court reserves jurisdiction of this cause for the purpose of hearing further evidence with respect to the location of said proposed educational institution, and for the purpose of hearing and considering inducements for locating said educational institution at different places in the State of Missouri, and for the purpose of assisting said Trustee in the selection of a location for such educational institution." The decretal part followed the findings, and following the reservation of jurisdiction, as above quoted, it was further decreed that "for the purpose of assisting the Trustee in the selection of a location" the court "appoints Mark W. Lowell, Walter P. Murphy and William Zingheim to act as a Committee to consider the applications for the use of the residue of the estate of Henry Edwin Sever, deceased, that have been made and that may hereafter be made, and said Committee shall advise this Court as to its recommendations with reference to such applications."

The committee of three made an investigation and study of the matter and March 1, 1944, two reports were filed, one by Mr. Murphy and Mr. Zingheim and the other by Mr. Lowell. The reports show in considerable detail what was done by the committee and what inducements were made by a number of schools, etc.

The majority report recommended that the application and proposal of the St. Louis University be adopted, while the minority

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The majority report recommended that the application and pro-
posal of the St. Louis University be adopted, while the minority

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report asserted that the selection was to be made by the trustee and that in his opinion, there were three Missouri Universities which qualified - Washington University of St. Louis, the University of Missouri, located at Columbia, and the University of Kansas City.

March 27, 1944, the chancellor rendered an opinion approving the selection of the St. Louis University, in which he referred to paragraph F of the first codicil of the will, to certain prayers for relief in the complaint, and to the reservation made in the decree of July 7, 1943; that the committee of three had done its work very thoroughly; that it had examined the proposals submitted in writing by 10 cities and towns in Missouri and by 14 colleges, academies and universities of that state with a view to determining what recommendations it should make to the court. That the committee also gave to all colleges, academies and universities which had submitted proposals, an opportunity for hearing the respective merits of their proposal, 10 of which took advantage of this opportunity through their representatives in hearings before the full committee. That the committee made special inspections of the premises and facilities of 11 of the colleges, academies and universities which had submitted proposals, including Washington University, St. Louis University, University of Missouri and the University of Kansas City.

The court then refers to the majority and minority reports made by the committee and its recommendations; that he had considered both of them very carefully and that the court was of opinion that the "establishment of the new educational institution should be done, not through a new corporation *** but rather through an existing University of undoubted stability and experience." The court then points out that the committee considered four of the institutions eligible namely, Washington University, Kansas City University, University of Missouri and St. Louis University. He then analyzes the reports as to the qualifications of the two uni-

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versities, Washington and St. Louis and says: "This Court is of opinion that the purposes of Paragraph F of Article Eleven of the First Codicil of the Will of Henry Edwin Sever shall be carried out by entrusting to Saint Louis University the residue of the Estate *** in trust for the establishment and maintenance of the educational institution along the lines of technology in the name of Henry Edwin Sever as provided in said will."

April 4, 1944, the plaintiff bank, as trustee, delivered to the chancellor a written document stating that it had exercised its discretion under the will and selected the Washington University, to whom the residuary fund would be turned over, giving its reasons for so doing and saying, among other things, that: "The inability of the Trustee to follow the views of the Court with reference to Saint Louis University is in no way a reflection upon the excellence of that University."

April 5, 1944, the Washington University filed its intervening petition in which it set up that on March 31, 1944, the plaintiff bank as trustee had informed it of its selection as the educational institution under the provisions of paragraph F of the first codicil to the will and that it had duly accepted and it prayed that an order be entered permitting it to become a party to the cause which was done.

On the same day by stipulation, the Hannibal-LaGrange College was permitted to become a party to the cause as of November 3, 1943, and to file its proposal with such proposal standing as its pleading, setting up and asserting its rights.

April 26, 1944, Thomas E. Blackwell, called as a witness by the Washington University, testified that he was treasurer and acting secretary of the board of directors of the Washington University; its selection by the plaintiff trustee and the acceptance by the Washington University.

May 5, 1944, St. Louis University filed its petition, setting

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 Acting Secretary of the Board of Directors of the Washington University,
 city; the collection by the University of the money and the
 the Washington University.
 May 2, 1944, St. Louis University filed the petition, setting

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up its organization as a non-profit educational institution; that it was recommended by a majority of the members of the committee appointed by the court to receive the residuary corpus of the Sever estate; that it is the "University designated by this Court to receive the income from the residuary estate" held by the plaintiff bank as trustee and prayed that an order be entered authorizing it to become a party defendant to the suit, and on the same day, an order was entered permitting it to intervene.

May 10, following, witnesses were called on behalf of the St. Louis University, two of them being members of the committee of three appointed by the court, and who filed the majority report of that committee. Father Holloran, president and Father Macelwane, professor and director of the Department of Geophysics of St. Louis University, also gave testimony as to the history and standing of the university as an educational institution.

W. B. Bliss, called on behalf of St. Louis University, testified that he was a teacher and administrator at Marquette University located at Milwaukee, giving his opinion as to the cost of constructing and equipping an institution such as that mentioned in the codicil. Professor O. W. Eshbach, Dean of Northwestern Technological Institute, also testified on behalf of St. Louis University that in his opinion it would not be practical or expedient to establish an independent school such as the testator contemplated with the use of the sum of money in the residuary fund.

About a month after this evidence was heard, the court, on June 7, 1944, rendered a supplemental opinion in which he said: "Since entering the Interlocutory Decree July 7, 1943, I have examined Reports of the Committee appointed by me having to do with the application of the residue of the Sever Estate, which Reports have now, as you all know, been received in evidence in this cause." That he had also examined the report of the trustee whereby it informed the court that: "irrespective of this Court's announced

up its organization as a non-profit corporation.

That it was incorporated as a non-profit corporation is the

committee appointed by the court to investigate the matter.

of the seven articles of incorporation, the first of which

Court to receive a license for the use of the word "court" in

plaintiff's name, and the second of which provided that

authorizing it to receive a license for the use of the word "court" in

same day, an order was made by the court that the

May 10, 1943, the court ordered that the

St. Louis University, and the other two of the

of three articles of incorporation, the first of which

of the articles of incorporation, the first of which

professor and director of the school of law of

University, also the director of the school of law of

the university of the city of St. Louis.

It is also to be noted that the court

affirmed that the court had no jurisdiction to

city located in St. Louis, and the court

construction and the court had no jurisdiction

in the school of law of St. Louis.

Technological Institute, and the court had no

University that is not a part of the school of law of

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About a month later the evidence was heard, and the

June 7, 1943, the court rendered a decision in which it said:

"Since entering the jurisdiction of the court in 1943, I have

examined reports of the committee appointed by the court to do

the application of the results of the seven articles, which are

have now, as you all know, been received in evidence in this case."

That he had also examined the report of the trustees whereby it

informed the court that: "In respect of this Court's announced

9.

intention to enter a decree in favor of the proposal by Saint Louis University, it had selected Washington University by virtue of the alleged discretion in the Trustee to do so. I have examined carefully the memorandum of law having to do with the inability of a court of equity to interfere with the exercise of discretions by a trustee, as well as a memorandum of law having to do with the execution of a charitable trust by a court of chancery cy pres. I have listened carefully to the testimony of witnesses, especially the testimony of Dean O. W. Eshbach, head of the Technological Institute of Northwestern University.*** that it is the contention of Washington University that I have heretofore construed the Last Will and Testament of Henry Edwin Sever, and particularly Paragraph F of Article Eleven of the First Codicil thereto, to the effect that it was the Testator's intention that his proposed School of Technology could be a part of an existing university;" that in the light of these things he had reviewed the decree of July 7, and his opinion rendered subsequent to the filing of the committee's reports, "I find that the language in the Interlocutory Decree entered by me is somewhat inapt. I find that under certain constructions some parts of it are even in conflict with other parts of it." That in construing paragraph F of the first codicil the court did not believe that the testator "had in mind that his proposed educational institution was to be a part of an existing university. Everything points to the contrary." The court then points out certain language of the will and continues: "These statements are wholly incompatible with the thought of establishing a School of Technology as a part of an existing university." That the court found in the interlocutory decree that the location of the educational institution was left to the discretion of the trustee and that if it were possible to carry out the testator's intention "as directed in the Will to establish a separate institution, I would be the last one to even intimate that the

Trustee did not have discretion to select the location. However, it is clear that at the time of the entry of the Interlocutory Decree, I had not found that it was impossible to establish such a school as the Testator desired as a separate independent institution."

The court then in substance found that the testator contemplated establishing an independent educational institution and that this could not be done because of insufficient funds. The trustee therefore had no discretion and the doctrine of cy pres was for the court alone. That applying this doctrine, the intention of the testator would be carried out as near as possible by the court selecting the St. Louis University, and a decree to this effect was entered June 14, 1944.

Counsel for the Washington University contend that the decree of July 7, 1943, was a final decree and the court was without jurisdiction to set it aside or modify it nearly a year thereafter. That July 7, 1943 it was decreed "that said educational institution may be an institution already existing and operating in the State of Missouri" and that the construction of the will in this respect is res adjudicata; that the doctrine of cy pres as decreed by the court is erroneous for the reason that it is contrary to the intention of the testator.

The position of Lewis C. Murtaugh, trustee for all persons not in being is that the finding of the court that it was the intention of the testator to establish a separate educational institution and that this could not be done by the use of the residuary fund available which was insufficient, is sound, and that the court should have then decreed that the bequest of the residuary fund lapsed and passed as intestate property.

The position of counsel for the heirs of the deceased is that the paragraph of the will reading: "The residuary of my estate,

11.

shall be used for the purpose of establishing an educational institution in my native state, the state of Missouri, this institution to bear my name" is clear and unambiguous; that by the language quoted the testator "directed that a complete institution be established, not a department added to some other school, nor a branch of technology created for some other school.*** It is our contention that neither the St. Louis University proposal nor the Washington University proposal does more than give faint lip service to this requirement." That "among the proposals appearing in the record, is a proposal from Hannibal-LaGrange College (pages 2828 to 2856 of record) in which that institution proposes for all time to change the name of the entire institution to Sever Institute of Technology, and to join its resources, including existing buildings, equipment and other property, with those of the testator's residuary estate for the purposes of carrying on the re-named and reorganized institution." That "even if one responsible proposal has been received by the Court or by the Trustee which meets and satisfies the precise terms and conditions of the testator's Will relative to the establishment of an educational institution in the state of Missouri bearing his name, it entirely negatives any purported finding of impossibility by the court below, and we contend that the proposal of Hannibal-LaGrange College is an example of such a proposal,*** and hence the decree entered below should be reversed and the cause remanded with appropriate directions that the wishes of the testator as set forth in his Will be carried out." Since the proposal of the Hannibal-LaGrange College is not analyzed or discussed but only reference is made to pages of the record, we give it no further consideration.

The decree of July 7, 1943, was entered on the pleadings. No evidence was heard. It was found and decreed that the educational institution which the testator provided for in paragraph F of the 11th article of the first codicil might "be an institution already

existing and operating in the State of Missouri;" and the location and the inducements that might be offered were left to the discretion of the trustee.

The committee of 3 investigated a number of institutions in Missouri and the inducements made. The minority report recommended that the trustee select the Washington University while the majority recommended the St. Louis University. The court then, with the information he had, found that it was the testator's intention to establish a new educational institution "from the ground up;" that this could not be done with the amount of money available and that for the purpose of establishing and maintaining the new educational institution the recipient must be an institution which had other resources. That the Washington University did not meet the requirements of the will, pointing out certain reasons, but found that the intention of the testator could be carried out by entrusting the residuary fund to the St. Louis University, specifying a number of facts which the court held qualified it.

A few days after this plaintiff trustee selected the Washington University as the institution to receive the fund and the latter accepted and agreed to use it in carrying out the testator's intention. Shortly thereafter, the two universities by leave of court, intervened. The Washington University offered no evidence except that it had agreed to receive the fund from the trustee. The St. Louis University put in evidence tending to show, among other things, that a new institution from the ground up would not be established by the use of the residuary fund of \$1,250,000. Some time after this, the court, on June 7, 1944, rendered a supplemental opinion in which he said he had carefully examined the law as presented by counsel "having to do with the execution of a charitable trust by a court of chancery ex pres." He then pointed out some contrary statements in his former opinion and in the decree of July 7, 1943 which

he said were inapt for the reason that he did not have all the facts in mind at that time and held that the intention of the testator could not be carried out with the amount of money available, but under the doctrine of cy pres it was the court's duty to carry out the testator's intention as near as possible, which could be done by the court selecting the St. Louis University, which was ready, willing and able to carry out the testator's intention as the court might order. And it was decreed that upon the St. Louis University filing its certificate showing that it would comply with the decree of the court the trustee should pay to it "for the exclusive use and benefit of the Sever Institute of Geophysical Technology the entire net income from the charitable trust estate." It was further decreed that the trustee invest and reinvest the moneys available and that the selection of Washington University by the trustee as the beneficiary of the residuary estate, and its acceptance, be declared null and void.

There is a great deal of argument in the briefs and a number of authorities are cited and discussed by counsel in which counsel for the Washington University contend that the decree of July 7, 1943, was final and adjudicated that the educational institution mentioned in the will might be an institution already existing and operating in the state of Missouri, and further, that a court of chancery was without power to interfere with the trustee's selection of the institution. On the other side, counsel for the St. Louis University's position is that the decree in this respect was not final and that under the facts, the doctrine^{of}/cy pres was applicable. In support of this counsel say that the decree of July 7, while it construed certain parts of the will, made no attempt to construe paragraph F as to whether the testator intended that the educational institution mentioned in the will might be an institution already existing in the state of Missouri. That the complaint asked for advice and not for construction of the will. That as a

[illegible]

14.

matter of fact, the language of the paragraph is not ambiguous and therefore the decree was not final. That the doctrine of cy pres, although not expressly mentioned in that decree, was invoked. We think that what the court said at the time this decree was entered indicated clearly that he was adjudicating that the educational institution mentioned by the testator might be one already existing and operating in Missouri. But in any event, we are of opinion that, upon a consideration of what took place after the entry of that decree and all other matters which appear in the record and briefs, that the Washington University and the St. Louis University is each able and willing, to carry out the testator's intention. And that the finding of the court to the effect that Washington University was unable to qualify is contrary to the record before us. No complaint is made by either university against the other. Counsel for the Washington University say: "We wish to say at this point that we do not conceive of this case as involving any issue between St. Louis University and Washington University, except the issue as to whose sponsor properly made the selection. But they think their client's proposal is the better. "But our client would not enter into this litigation if it was believed to involve on the part of these two neighboring universities any mutual disparagement of each other."

Holding as we do that the Washington University was qualified to carry out the testator's intention, and it having been selected by the trustee as the institution to receive the residuary fund, the doctrine of cy pres does not apply. It was the duty of the trustee and not of the court to make the selection.

The decree of the Superior court of Cook county in the matters complained of is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

Niemeyer, P.J., and Matchett, J., concur.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

October Term, A. D. 1944.

Term No. 43021

Agenda No. 23.

JOHN P. BROWN, JOHN KEMPER, ED
SWAIN, G. W. MILLER and EUGENE
JORDON,

Petitioners and Appellants,)

vs.)

COUNTY COURT OF ALEXANDER COUNTY,
ILLINOIS, ASA J. WILBOURN, Judge
of the County Court of Alexander
County, Illinois, PAUL S.
CLUTTS, Clerk of the County
Court of Alexander County,
Illinois, and MARVIN KERR,

Respondents and Appellees.)

324 I.A. 657

Appeal from the

✓ Circuit Court of

Alexander County,

Illinois.

STONE, J.

A petition for the common law writ of certiorari was filed in the Circuit Court of Alexander County, on January 8th, 1943 by John P. Brown, John Kemper, Ed. Swain, G. W. Miller and Eugene Jordon, Petitioners and Appellants, who will hereinafter be designated as Petitioners, to review the proceedings and judgment of the County Court of said county in the matter of the contest of an election held under the provisions of the Dram Shop Act of Illinois (Liquor Control Act of 1934). The contest of the election was brought under Section 17 of Article 9 of the Liquor Control Act. An election was held in Road District No. 6 of Alexander County on November 3, 1942, in which was submitted the proposition, "Shall the sale of intoxicating liquor be prohibited in Road District No. 6 of Alexander County, Illinois?" Upon the proposition 216 voted "Yes" and 210 voted "No."

Thereafter a petition to contest the election was filed in the County Court by Wilbert Davis, et al. Intervening motion

was filed by the petitioners herein to dismiss the petition to contest said election under the provisions of Section 17 of Article 9 of the Liquor Control Act on the grounds that the County Court was without jurisdiction.

Upon hearing of the motion to dismiss the petition, the County Court overruled the motions of petitioners and entered a judgment declaring the election null and void, whereupon petitioners filed their petition for the common-law writ of certiorari in the Circuit Court of Alexander County to review the record of the County Court. Upon a hearing of the cause in the Circuit Court, judgment was rendered against petitioners and the writ of certiorari quashed. From that judgment petitioners prosecute their appeal to this court.

The reasons assigned by petitioners in their motion questioning the jurisdiction of the County Court, and urged as error in this court on the part of the Circuit Court in quashing the writ are, primarily, that the petition to contest said election was not properly verified in accordance with the law, and that the bond for costs was not given in accordance with the statute in such case made and provided.

The statute upon which the election contest was predicated provides, "any five legal voters of any political subdivision, district, precinct or group of precincts in which an election shall have been held as provided for in this Act, may within ten days after the canvass of the returns of such election and upon filing a bond for costs, contest the validity of such election by filing a verified petition in the County Court of the County in which such political subdivision, district, precinct or group of precincts is situated, setting forth the grounds for the contest." Sec. 17, Article 9, Chapter 43, Rev. Stat. Ill. 1941.

The affidavit attached to the petition which was filed

1. The first part of the paper is devoted to a study of the properties of the function $f(x)$ defined by the equation

$$f(x) = \frac{1}{2} \left(f\left(\frac{x}{2}\right) + f\left(\frac{x+1}{2}\right) \right) \quad (1)$$

where $f(x)$ is a function defined on the interval $[0, 1]$.

2. In the second part of the paper we shall study the properties of the function

$$g(x) = \frac{1}{2} \left(g\left(\frac{x}{2}\right) + g\left(\frac{x+1}{2}\right) \right) \quad (2)$$

where $g(x)$ is a function defined on the interval $[0, 1]$.

3. In the third part of the paper we shall study the properties of the function

$$h(x) = \frac{1}{2} \left(h\left(\frac{x}{2}\right) + h\left(\frac{x+1}{2}\right) \right) \quad (3)$$

where $h(x)$ is a function defined on the interval $[0, 1]$.

4. In the fourth part of the paper we shall study the properties of the function

$$k(x) = \frac{1}{2} \left(k\left(\frac{x}{2}\right) + k\left(\frac{x+1}{2}\right) \right) \quad (4)$$

where $k(x)$ is a function defined on the interval $[0, 1]$.

5. In the fifth part of the paper we shall study the properties of the function

$$l(x) = \frac{1}{2} \left(l\left(\frac{x}{2}\right) + l\left(\frac{x+1}{2}\right) \right) \quad (5)$$

where $l(x)$ is a function defined on the interval $[0, 1]$.

6. In the sixth part of the paper we shall study the properties of the function

$$m(x) = \frac{1}{2} \left(m\left(\frac{x}{2}\right) + m\left(\frac{x+1}{2}\right) \right) \quad (6)$$

where $m(x)$ is a function defined on the interval $[0, 1]$.

7. In the seventh part of the paper we shall study the properties of the function

$$n(x) = \frac{1}{2} \left(n\left(\frac{x}{2}\right) + n\left(\frac{x+1}{2}\right) \right) \quad (7)$$

where $n(x)$ is a function defined on the interval $[0, 1]$.

8. In the eighth part of the paper we shall study the properties of the function

$$o(x) = \frac{1}{2} \left(o\left(\frac{x}{2}\right) + o\left(\frac{x+1}{2}\right) \right) \quad (8)$$

where $o(x)$ is a function defined on the interval $[0, 1]$.

9. In the ninth part of the paper we shall study the properties of the function

$$p(x) = \frac{1}{2} \left(p\left(\frac{x}{2}\right) + p\left(\frac{x+1}{2}\right) \right) \quad (9)$$

where $p(x)$ is a function defined on the interval $[0, 1]$.

10. In the tenth part of the paper we shall study the properties of the function

in the county court recited that the, "matters and things therein stated to be true of his own knowledge are true in substance and in fact and that the matters and things therein stated as being upon his information and belief are true to the best of this affiant's knowledge, information and belief." It is contended on the part of counsel for petitioners that this verification is fatally defective and not sufficient to give the County Court jurisdiction of the proceedings to contest the election, and cite in support of their contention the case of The People vs. Jenner, 214, Ill. App. 323, which held in substance that a petition in this kind of a case must be positively verified and was in turn based upon a decision in support of that holding, Kind vs. Haines, 23 Ill. 340.

In the Kind case, the question of verification related to a plea in abatement, which under the statute at that time required such pleas to be positively verified. The Jenner case was decided almost fifteen years prior to the present Civil Practice Act, which provides, that, "Any pleading, although not required to be sworn to, may be verified by oath of the party filing the same or of any other person or persons having knowledge of the facts pleaded. ***** In pleadings which are verified by the oath of the party, the several matters stated shall be stated positively or upon information and belief only, according to the fact. **** Civil Practice Act, Sec. 35, Chap. 110, Rev. Stat. Ill. 1941. The Act further provides that, "The provisions of this Act shall apply to all civil proceedings, both at law and in equity, unless their application is otherwise herein expressly limited. ***** Civil Practice Act, Sec. 1. Chap. 110, Rev. Stat. Ill. 1941. Above Section 35 of the Civil Practice Act provides for the verification of pleadings in election contest cases, just the same as it provides for the verification of pleading under any other kind of action. This

Act, under the enactment of the Legislature by its own language is to be liberally construed to the end that controversies may be speedily and finally determined according to the substantive rights of the parties.

Every allegation in the petition in the case at bar is a positive averment, except an averment in Paragraph 5 of said petition. Every other allegation is a positive one and not predicated upon information and belief. Paragraph 5 of the Petition alleged that upon the canvass of said votes at two polling places there were counted through mistake a large number of votes, to-wit 15 votes as voting "Yes" upon the proposition, when, as the petitioners were informed and believed, and upon such information and belief stated the facts to be that the said number of votes, should have been counted as voting "No" upon said proposition. This paragraph could very well have been disregarded as surplusage, and the petition still have been held sufficient.

The cases of Daugherty vs. Carnine, 261 Ill. 366, and Armstrong vs. Wilkinson, 346 Ill. 322, cited by petitioners are not in point. In the Daugherty case, the affidavit in question was held bad, because it was not sworn to. In the Armstrong case, the affidavit neither affirmed that the matters and things contained in the petition were true as therein stated, nor, in fact contained any reference to the truth of the statement except as to such matters as were stated to be upon information and belief.

In the case of Farrel vs. Heilberg, 262 Ill. 407, it was held that an affidavit to a petition to contest an election was sufficient which stated that the affiant, "Has read the foregoing petition subscribed to by him and knows the contents thereof and that the same is true, except as to matters therein set forth upon information and belief and as to such matters he believes them to be true." The rule laid down in the above case has been

THESE THINGS ARE NOT TO BE TAKEN AS
A WARNING TO THE FUTURE BUT AS A
REMARK ON THE PRESENT.

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REMARK ON THE PRESENT.

followed in the following cases, Smith vs. Township High School Dist. 335 Ill. 346; Girhard vs. Yost 344 Ill. 483; Smiley vs. Lenane, 363 Ill. 67; Waters vs. Heaton, 364 Ill. 150.

In Farrel vs. Heilberg, supra the Court said, "The Statute should have a reasonable construction in order to accomplish the purpose intended. To hold that a petition to contest an election should only contain such statements as were within the contestant's own personal knowledge would be impracticable, since from the very nature of the proceedings the contestant must rely largely on information obtained from others, and as to such information the contestant could only make oath that he believes the statements to be true. The verification of the petition was sufficient." We are inclined to follow this reasoning and the line of cases set forth above, and hold that the verification of this petition was sufficient.

It is contended on the part of counsel for petitioners that the security for costs given by respondents does not comply with Section 17 of Article 9 Liquor Control Act, providing for the contest of the validity of an election, in that the instrument was not under seal, and in support of his contention cites again the case of The People vs. Jenner, supra.

The Jenner case held that an instrument in the form prescribed by what is now Section 1 of the Costs Act, Chapter 33, Rev. Stat., Ill. 1941, and termed by such Act, "Security for costs" is not a bond for costs, as a bond must be under seal. Such finding in the Jenner case is based upon the case of Chilton vs. People 66 Ill. 501, which is a bastardy case, where the judgment of the court was that defendant, being found guilty, pay the sum of \$100.00 to the mother of the child the first year and \$50.00 each year thereafter for nine years. Upon defendant, leaving without giving bond, according to the conditions of the judgment,

suit was brought upon the appearance bond, which provided that if "John N. Chilton shall appear at the next Circuit Court to be holden in and for the county of Madison, and answer to the said complaint, and not depart the court without leave, then this obligation to be void, otherwise to remain in full force and virtue." There the court held that such bond should be under seal.

We find no similarity between a bond for appearance to answer at a certain term of court, and a bond for costs, as provided for in Section 17 of the Dram Shop Act.

The bond given in this case was as follows, "I hereby enter myself security for all costs that may accrue in the above entitled cause. Marvin Kerr," which follows substantially the form of security for costs, which is set out in Section 1, Chapter 33, Rev. Stat. Ill. 1941. When a person executes a bond for costs, in behalf of the plaintiff in a cause in the form prescribed in the statute, he will be liable, not only for the defendant's costs, and such as may accrue to the officers of the court, but for all the costs which may be made in the case, without reference to the person to whom they may accrue. *Whitehurst vs. Coleen*, 53 Ill. 247. In this case and in other cases where the question was involved, the terms security for costs and bond for costs are used interchangeably.

Certainly when the Legislature provided in the Dram Shop Act that any five legal voters, "upon filing a bond for costs" might contest the validity of any election, all that was contemplated was that respondents therein, the officers of the court, and any other person to whom costs might accrue, would be secure therein. In the case of *Town of Browning vs. Gelman*, 79 Ill. App. 336, the following writing, "We hereby enter ourselves as security for cost in the above entitled cause," was held a valid common law obligation, and as such binding upon the signers,

whether the statute did or did not require a cost bond to be given. We are inclined to the belief, that this instrument, whether it be called bond for costs, or security for costs, fulfilled its purpose, contemplated by the statute, and was a sufficient bond.

Finding no reversible error in this record, the judgment of the Circuit Court of Alexander County will be affirmed.

AFFIRMED.

Abstract.

FILED

OCT 27 1944

David J. Mallett

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

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*This opinion was
affirmed and
by Judge Wefer*

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Gen. No. 9882

Agenda No. 11

IN THE
APPELLATE COURT OF THE
STATE OF ILLINOIS
SECOND DISTRICT

1583

OCTOBER TERM, A. D. 1944

In the Matter of the Estate of
Minnie Feldman, Deceased.

Gertrude Van Zele, Executrix of the
will of Leon Van Zele, Deceased,
Appellant,

v.

Jay J. Smaltz, Executor of the Will
of Minnie E. Feldman, Deceased,
Appellee.

3241A.658

Appeal from the
Circuit Court of
Whiteside County

Dove, P. J. :

This cause involves the construction of the provisions of a promissory note for \$3000.00 executed and delivered by Minnie E. Feldman to her son, James C. Feldman, dated March 1, 1931. The principal issue is the due date of the note. Its pertinent portions, giving rise to the controversy, including its date, above mentioned, are as follows: "On or Before date we jointly and severally promise to pay," etc. In the lower left hand corner are the words and figures: "Due March 1, 1939." The note is on a printed form, with the italicised words and figures in hand writing. It was first assigned by the payee to Leon Van Zele as collateral security for a \$1500.00 note executed by James C. Feldman and one Charles E. Ward, due January 2, 1933/ The latter note was not paid at maturity, whereupon another \$1500.00 note, due January 2, 1934, executed by Hazel Feldman, was substituted therefor, collaterally secured by the \$3000.00 note,

In the matter of

George J. ...

v.

The ...

Now, ...

promissory note

belonging to ...

principal ...

giving rise to ...

are as follows:

to pay, ...

"Due March 1, 1988"

belonged to ...

be the same to ...

note executed by ...

January 2, 1988. The ...

another ...

was ...

the indebtedness under the first \$1500.00 note was released, and the \$3000.00 note was assigned to Hazel Feldman, subject to the rights and interests of Van Zele therein, and he continued to hold it until his death on December 26, 1933, as collateral security for the \$1500.00 note of Hazel Feldman. In August, 1933, James C. Feldman and a brother were adjudged bankrupts, individually and as co-partners. The \$3000.00 note was not listed as an asset, but in the adjustment of accounts between James C. Feldman and his mother, Van Zele produced it under an order of the referee, testified in respect thereto, and it was afterward returned to him.

Minnie E. Feldman died February 20, 1941, and on June 25, 1941 a claim was filed in the County court of Whiteside County against her estate by the Executor of Leon Van Zele, deceased, for the \$3000.00 principal of the note, plus interest of \$1362.75. Defenses were interposed to the claim, revolving around the question of the due date of the note and the statute of limitations. It was also claimed that the note was discharged by the bankruptcy proceedings, of which Van Zele was aware, and that the claimant was guilty of laches. The claim was disallowed by the county court, with a like result on appeal to the circuit court, and the latter judgment was affirmed by this court on the ground that the words and figures : "Due March 1, 1939" in the lower left hand corner of the note were not a part thereof, and that the owner of the note was guilty of laches. (~~Van Zele, Executrix, etc. v. Smaltz, Executor, etc., 320 Ill. App. 243.~~) The judgment of this court was reversed upon an appeal to the Supreme Court of this State and the cause was remanded to this court for further proceedings consistent with the opinion of the Supreme Court. ~~Van Zele, Executrix, etc. v. Smaltz, Executor, etc., 320 Ill. App. 243.~~ re, Estate of Minnie E. Feldman, 387 Ill. 568.

There is no evidence in the record of the time when the due date in the left hand corner of the note was inserted therein. Other

facts need not be repeated here as they are fully set out in the opinion of the Supreme Court.

The Supreme Court held that because of the absence of any evidence as to when the due date blank was filled in, the presumption is that it was done contemporaneously with the execution of the instrument and that the note in controversy matured, in fact on March 1, 1939, excluding any question of laches. It was also held that the note was not discharged by the bankruptcy proceedings mentioned, and that Van Zele was a holder in due course. Under section 27 of the Negotiable Instruments act, however, the claim can be allowed only to the extent of the unpaid balance, if any, due on the \$1500.00 note of Hazel Feldman, plus interest.

Accordingly, the judgment of the circuit court is reversed and the cause is remanded to that court for further proceedings, consistent with the opinion of the Supreme Court.

Reversed and remanded.

IN THE APPELLATE COURT OF THE
STATE OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, 1944

Ida K. Brown,

Appellee,

v.

City of Streator,

Appellant.

Appeal from the

Circuit Court of

LaSalle County.

Dove, P. J. :

Appellee recovered a judgment for \$600.00 against appellant in the circuit court of LaSalle County, in account of injuries sustained by stumbling in a depression in a concrete sidewalk on Main Street in the principal business district of the City of Streator. A jury trial was had and the cause is here on the city's appeal.

The numerous grounds urged for reversal necessitate a review of the testimony. Appellant, a widow forty five years of age, at the time of the trial, lived in an apartment on the second floor at 301 Main Street, the entrance to which is on the east side of Monroe Street, which intersects Main Street and runs north and south. Main Street runs east and west. The building in which she lived is directly east across Monroe Street from the Paris Cloak Company's store at the southwest corner of the intersection. Appellee was employed as a clerk at a bakery on Park Street, which intersects Main Street one block west of Monroe Street, the bakery being about one half block north of Main Street.

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Section. Appellee was employed as a clerk at a bank on Park

after which, during the period of the investigation, the following persons were interviewed:

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She had been employed there since January, 1942, working eight hours a day for six days a week, and had been earning \$18.00 per week since March 1942. The accident occurred on the Main Street sidewalk in front of the Paris Cloak Company's store, on the morning of November 5, 1942, while appellee was walking west to her place of employment. It was foggy and misting, and the street and the sidewalk were wet. Appellee started from home about 5 minutes before 8 o'clock, wearing oxford laced shoes, with heels about one inch high.

The sidewalk at that point is 16 feet, 4 inches wide, and the photographs in evidence show it to have been built on a level along the block between Monroe Street and Park Street. Starting at a point 16 feet, 7 inches west of the northeast corner of the Paris Cloak Company's store, there was a block of the sidewalk, 5 feet, 10 inches long, east and west, and 3 feet, 11 inches wide, north and south, with the south edge, at the building line, depressed one eighth of an inch, and the north edge depressed seven eighths of an inch below the level of the adjacent portions of the walk. The west end of the depression was 1 foot, 8 inches east of the west line of the building. At the west end of the building, the next block of the sidewalk along the building line is considerably wider, and its east end had dropped one and three fourths inches, and was connected with the sidewalk to the east by an asphalt incline. These distances and dimensions appear from a diagram admitted in evidence, and by the testimony of the witness who prepared it, and are not disputed.

Appellee stumbled with her left foot in the north side of the depression, and suffered a complete fracture of the proximal end of the metatarsal bone which is back of and articulates the little toe. She testified that she did not fall down, but stumbled three or four feet west and toward her right, striking

the concrete twice, and felt a pain in her injured foot, but went on to the bakery, leaving there at ten o'clock in the morning, on account of the pain. She testified that where she first stepped down the edge was round, and where she bumped her foot the edge was sharp and jagged. She was taken from her home in her sister's car to a hospital, where the foot was X-rayed by the order of her attending physician, who placed the foot in a cast, after which she returned to her home, resuming work eight weeks afterward. She paid the doctor \$23.00, a hospital bill of \$10.00, paid \$2.50 for crutches, and paid her sister \$5.00 per week for eight weeks housework, receiving no wages meanwhile. This aggregates a financial loss of \$219.50. She testified that the pain continued up to the time the cast was taken off, and that at the time of the trial, (about one and one half years after the accident,) she still had pain and swelling in the foot after working eight hours. She further testified that in going to work she took the course above mentioned along the sidewalk about half the time for almost a year prior to the accident, and had used the sidewalk in front of the Paris Cloak Company, on many other occasions; that she knew that there was a low spot in the sidewalk, but had never noticed there was any such hole there until she stepped into it; that she had seen the one in the middle of the sidewalk, but not the one into which she stepped; that on the day of the accident she noticed that there were two holes there; that she usually traveled the outside of the sidewalk unless it was on account of the weather, and when asked if she traveled the inside every time the weather was bad, she said "Not necessarily", and that "this time" it seemed she did.

From the testimony of two witnesses who had traveled the sidewalk in front of the Paris Cloak Company for five and seven and one half years, respectively, next prior to the accident,

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asked if she traveled the sidewalk every time the foot was injured

she said "not necessarily", and the foot was injured

from the testimony of two witnesses who had traveled the

sidewalk in front of the Pacific Glass Company for five and seven

and one half years, respectively, next prior to the accident,

it appears that the condition of the sidewalk on that day had existed unchanged for all of that time. Each of them estimated the depth of the north side of the depression as being from one to one and one half inches. One of them, an eye witness to the accident, also testified that the depression had a very sharp edge; that appellee stumbled to her right; and that off to the center of the walk after leaving the incline there was quite a hole. Both of these witnesses testified that the sidewalk is on the main public street of the city; that it is used by a great many pedestrians, and is one of the busiest places in the city.

The only witness called by appellant, a photographer who took pictures of the place of the accident which were introduced in evidence by appellant, testified on cross-examination that he took the pictures looking west (the direction plaintiff was walking) and that to show the depression to the best advantage one should take the pictures from the opposite direction looking east.

The claims that the court erred in refusing to direct a verdict for appellant, and in refusing its motion for judgment notwithstanding the verdict, are based on the theory that the defect in the sidewalk was so slight that danger therefrom was not reasonably to be expected, absolving the city, as a matter of law, from liability; and that appellee was guilty of contributory negligence. Cases cited by appellant, where a sidewalk was built on two different levels, plainly apparent to pedestrians, to conform to different ground levels, are not in point. In *Luse v. City of Chicago*, 321 Ill. App. 628, where one cement slab had pulled away from and had sunk two or two and one half inches lower than the slab next to it, it was held that the city could not be held, as a matter of law, not negligent in failing to repair the defect; and in *Keznowski v. City of LaSalle*,

it appears that the condition of the sidewalk on that day had
 existed unchanged for all of that time. Each of them estimated
 the depth of the hole as being from one
 to one and one-half inches. The witness to the
 accident, also testified that the hole was very small
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 center of the sidewalk, but near the edge. It was about
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 The only witness to the accident, also testified that the
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 in evidence of the fact that the hole was not in the center of the sidewalk,
 took the witness to the hole, and showed it to the jury.
 walking) and that the hole was not in the center of the sidewalk,
 one about the hole, and showed it to the jury.
 east.
 The witness to the accident, also testified that the hole was not in the center of the sidewalk,
 verdict for the plaintiff, and that the hole was not in the center of the sidewalk,
 notwithstanding the fact that the hole was not in the center of the sidewalk,
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 not reasonably to be expected, and that the hole was not in the center of the sidewalk,
 of law, from liability; and that the hole was not in the center of the sidewalk,
 tributary negligence. Each of them estimated that the hole was about
 walk was built on the sidewalk level, and that the hole was not in the center of the sidewalk,
 pedestrians, to conform to different ground levels, and not in
 point. In June v. City of Chicago, 20 Ill. App. 628, where
 one cement slab had pulled away from the sidewalk two or two and
 one half inches lower than the slab next to it, it was held that
 the city could not be held, as a matter of law, not negligent in
 failing to repair the defect; and in Kaznowski v. City of LaSalle,

316 Ill. App. 115, this court held that where a hole had existed in a sidewalk for 8 or 10 years, and pedestrians had tripped in it, the defect was not so slight that the city was not guilty of negligence. In the case at bar the depression into which appellee stepped had a sharp edge and was of such a depth that when appellee stumbled in it she broke a bone in her left foot. According to her testimony she did not know there was such a hole there. The holding in *Vizard v. Cummings*, 318 Ill. App. 545, relied upon by appellant, that the plaintiff was guilty of contributory negligence, as a matter of law, where, in alighting from a street car, she was looking down at and saw the condition of the street and what she was stepping upon, is not applicable here.

It is well settled that although a person goes upon a sidewalk knowing it to be defective or out of repair, this does not establish negligence per se on his part, if he is in the exercise of ordinary and reasonable care, but the plaintiff's knowledge of the condition is one of the circumstances to be considered by the jury in determining whether there has been the exercise of due care; and whether due care was exercised in using the sidewalk, knowing it to be defective or out of repair is a question of fact for the jury. (*Wallace v. City of Farmington*, 231 Ill. 232, 235; *City of Mattoon v. Faller*, 217 Ill. 273, 281; *City of Streator v. Chrisman*, 182 Ill. 215, 217; *Village of Clayton v. Brooks*, 150 Ill. 97, 105; *City of Flora v. Naney*, 136 Ill. 45, 47.)

As to the claim that appellee did not prove that she was in the exercise of due care, and that she was guilty of contributory negligence, the testimony shows that she was walking along the sidewalk on a foggy, misty morning. She knew there was a low place in the sidewalk, but, usually walking on the outside of the walk, she had never seen the hole, which could

be seen to better advantage from the opposite direction to the one in which she was walking. The claim that she was also guilty of contributory negligence by not wearing rubbers or galoshes, obviously merits no consideration. It is not claimed that she slipped on the sidewalk, and it is not suggested how the wearing of rubbers or galoshes would have aided in preventing her from stepping into the hole or stumbling in it. Appellee testified that she was walking in the ordinary manner that she usually did when going to work. Although a municipality is not bound to keep its streets and sidewalks absolutely safe for persons passing over any part of them, it has the duty to exercise ordinary care to keep them reasonably safe for persons who exercise ordinary care. (Storen v. City of Chicago, 373 Ill. 530, 534; Brennan v. City of Streator, 256 Ill. 468, 471.) The question of negligence does not become a question of law unless the evidence is such that all reasonable minds would agree that the defendant was not negligent in his acts or that the injury was the result of the plaintiff's own negligence. (Kaznowski v. City of LaSalle, supra.) The trial court did not err in denying the motions for a directed verdict and for judgment notwithstanding the verdict. Under the circumstances above related, neither can it be said that the verdict is against the manifest weight of the evidence, on either of the questions of actionable negligence on the part of appellant, or due care on the part of appellee, both of which were questions for the determination of the jury.

Appellant's contention that there was not sufficient proof to show that the sidewalk was dedicated to public use is equally without merit. The testimony shows without contradiction that Main Street is the principal public street of the city, that the sidewalk is on and a part of the street, and has been in long

be seen to better advantage from the opposite direction to the
one in which she was walking. The claim that she was also
guilty of contributory negligence is not supported by the
evidence, obviously because contributory negligence is not claimed
that she slipped or fell. It is suggested now
the witness is not a competent person to be relied on in determining
her from anything but the fact that she was walking in the
testified that she was walking in the street at the time the
usually. It is suggested that the witness is not
bound to testify that she was walking in the street at the time
some persons were walking in the street. It is suggested
ordinary persons are not competent to testify that persons are exercising
ordinary care. The witness is not a competent person to testify that
Brennan was walking in the street at the time the witness was walking
negligence is not claimed. The witness is not a competent person to
testify that the witness was walking in the street at the time the
not negligent. The witness is not a competent person to testify that
plaintiff's negligence was a proximate cause of the injury. (See
The trial court in this case has found that the witness was
verdict and the judgment of the court. Under the
circumstances, it is suggested that the witness is not a competent
verdict is not a competent person to testify that the witness was walking
of the question of whether the witness was walking in the street at the time
or due care on the part of the witness. It is suggested that the witness
for the determination of the fact.
Appellant's contention that there was not sufficient proof
to show that the witness was negligent is equally
without merit. The question is not whether contributory negligence
Main Street is the principal north-south artery of the city, that the
sidewalk is on the east side of the street, and the road is long

and constant use by the general public. This was a sufficient showing. (Melin v. Community Consolidated School District No. 76, 312 Ill. 376; City of Rock Island v. Starkey, 189 Ill. 515, 524; City of Sullivan v. Tichenor, 179 Ill. 97; Louk v. Woods, 15 Ill. 256.)

The court did not err in refusing appellant's motion for an order requiring appellee to submit to a physical examination by a physician selected by appellant, concerning her injuries. It is claimed in appellant's brief that the evidence shows that appellee's attending physician refused to give appellant a statement of his examination as to any such injury, but the motion does not allege any such refusal, and the attending physician testified he had never refused to give appellant such a statement, but had left unanswered a letter from appellant's counsel asking for a written statement of the injury to the foot. Furthermore, the court had no power to make or enforce such an order. (Parker v. Enslow, 102 Ill. 272, 279; Joliet Street Railway Co. v. Call, 143 Ill. 177, 182; Peoria, Decatur and Evansville Railway Co. v. Rice, 144 Ill. 227, 232.)

Appellant also complains that the court erred in refusing its 7th offered instruction, which told the jury that if they believed from the evidence "that there was a defect in the sidewalk where plaintiff alleges she fell but if you further believe from the evidence that the depression in the sidewalk did not exceed seven eighths of an inch then as a matter of law the sidewalk in itself was not dangerous to the safety of a person passing over it with reasonable care and caution". The instruction clearly invaded the province of the jury on a question of fact, and stated a proposition that was for the determination of the court.

Appellant's 8th refused instruction told the jury that "the plaintiff must prove her case by the preponderance of the evidence but that does not mean that the plaintiff has more witnesses than the defendant or that the defendant has more witnesses than the plaintiff. It means that the true testimony and facts presented to you should be considered by you in its entirety regardless of who presented it in court." It is claimed that appellee's counsel argued to the jury that appellee had more witnesses than appellant and therefore proved her case without any question. There is nothing before us which tends to uphold this claim and we cannot consider it. As tendered, the instruction tended to lead the jury to think that the number of witnesses is not an element on the question of preponderance, which it is, if the witnesses are of equal credibility and have the same opportunity to observe and know of the matters to which they testify. All of which, with the demeanor of the witnesses on the stand, and their interest or want of interest in the subject matter, are proper elements to be considered by the jury on the question of preponderance. (Meyer v. Mead, 83 Ill. 19, 21; Skulimowski v. Deahl, 169 Ill. App. 355.) Where an instruction selects one fact disclosed by the evidence, and states that a certain conclusion does not follow as a matter of law from that fact, it is calculated to mislead and confuse the jury. (Garvey v. Chicago Railways Co., 339 Ill. 276. 287.)

Appellee's third and fourth given instruction are criticized by appellant, but we are of the opinion that they are correct statements of the law.

The claim that the amount of the verdict has no basis in the evidence is without merit. She had an actual financial loss of \$219.50, leaving less than \$400.00 for the pain and suffering to which she testified, and which is not disputed.

Finding no reversible error in the record, the judgment of the circuit court is affirmed.

Judgment affirmed.

Finding no reversible error in the record, the judgment
of the circuit court is affirmed.

In the Appellate Court of the
State of Illinois
Second District

October Term, 1944

Myron M. Segal, doing business as
Acme Equipment Co., not Inc.,
Plaintiff-Appellant,

v.

Harry B. Stoner and Stoner Manufact-
uring Corporation, Inc.,
Defendants-Appellees.

Appeal from
Circuit Court of
Kane County

Dove, P. J.:

Appellant sued appellees in the circuit court of Kane County for damages on account of an alleged conversion of a No. 53 National Acme Automatic Screw Machine and a No. 5 R and K Punch press, allegedly purchased by appellant from appellees at the price of \$1000.00 for the screw machine and \$500.00 for the punch press, and allegedly paid for by a check drawn by Acme Equipment Co., for \$1500.00 to and payable to the order of appellee, Harry B. Stoner. Issue was joined, and appellees also interposed the defense that the alleged sale was void under the 4th section of the Sales act, (Ill. Rev. Stat. 1943, chap. 121½, par. 4). A trial by the court without a jury resulted in a judgment for appellees, and the cause is here by an appeal from that judgment.

Appellant resides and does business in Chicago. Harry B. Stoner is president of the defendant corporation, whose plant is located at Aurora. Mr. Stoner advertised the two machines for sale in the Chicago Tribune, and responsive thereto appellant went to the plant at Aurora, and whatever transaction took place

TO THE SECRETARY OF THE ARMY
WASHINGTON, D. C.

Very respectfully,
Your obedient servant,

John M. Smith
Major General, U. S. Army

Enclosed for the Secretary of the Army are two copies of a report of the

Inspector General, U. S. Army, dated at Washington, D. C., on the 10th day of

January, 1900, and a copy of a letterhead memorandum of the same date.

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was between him and Mr. Stoner. The testimony tends to show that no one else heard their conversation. Mr. Stoner, called by appellant as an adverse witness, testified that in their conversation appellant asked the price of the two machines, and that he, the witness, told Mr. Stoner that "the best offer takes"; that appellant then offered \$1200.00 for the two machines, and the witness told him that he did not care what he offered; that thereupon appellant gave him the check for \$1500.00 as an offer and that the witness so accepted the check; that he, Stoner, demanded cash, and appellant then wanted to know why a check would not do as a bona fide offer; and that the witness told him a check did not mean anything like cash and that if his offer was accepted it would not be considered a sale nor could he get the machinery until the check had cleared; that on the next day he, Stoner, called appellant by telephone and told him he did not offer enough, and asked him for a better offer if he wanted the machines, but did not tell him how much it would require to buy them; that he did tell him that if he, appellant, bought the machines they were to be sold F. O. B. the plant. Mr. Stoner denied that he ever told appellant that the foreman did not know of the sale and that he, the foreman, had re-sold them to a third party in Milwaukee. Mr. Stoner further testified that the condition of the automatic screw machine was junk, but that it was not sold as junk.

The record discloses that the check was returned by appellee to appellant and the machines were sold to another party but the price at which they were sold does not appear. Testimony on behalf of appellant is to the effect that the screw machine had a value of \$3250.00 and the punch press \$750.00. The punch press was on skids, and the screw machine had been in use up to the time of the alleged sale.

Appellant testified that Mr. Stoner priced the screw machine to him at \$1000.00 and the punch press at \$500.00 and

that the witness agreed to take them at that price; that Mr. Stoner asked him to give him a check for them at that time, and that he did so; that Mr. Stoner did not ask him to give him the money in the nature of an offer; that after the delivery of the check, Mr. Stoner told him that he, the witness, could send a truck for the machines, and that when the witness said he had no truck, Mr. Stoner said that they had a man who did most of their work, and that it was agreed that Mr. Stoner would ship the machines by this man, at appellant's expense; that \$1500.00 was all that Mr. Stoner was to get out of the transaction; that two days afterward Mr. Stoner called him and informed him that he would have to send the check back because he, Mr. Stoner, was not there the day before, and that his foreman had sold the machines to someone in Milwaukee and they had removed the machines immediately; that the witness said he had bought the machines; and wanted them shipped to him and did not want his check back, to which Mr. Stoner replied in substance that he could not do anything about it.

These were the only two witnesses to the transaction and their testimony is ~~manifestly~~ contradictory as to whether there was an actual sale of the machines, or only an offer to purchase which was not accepted. It is elementary that to constitute a contract, an offer must be accepted. The trial court saw and heard the witnesses testify, and was in a better position to judge of their credibility than a reviewing court. In such cases a court of review will not substitute its finding of fact for that of the trial court unless the judgment is clearly against the manifest weight of the evidence. (City of Quincy v. Kemper, 304 Ill. 303, 307; Haug v. Haug, 193 Ill. 645, 649; Western and Southern Life Ins. Co. v. Bruoggegan, 323 Ill. App. 173, 180; Buttles v. Adkins, 318 Ill. App. 24, 30.)//

There is nothing in the record which convinces us that the judgment is against the manifest weight of the evidence. Under such circumstances it is not necessary to consider whether the

such circumstances it is not necessary to consider whether the judgment is against the heaviest weight of the evidence. Under there is nothing in the record which indicates that the

175, 180; Butler v. Butler, 210 Ill. 444, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

transaction was void under the 4th section of the Sales act.

The judgment of the trial court is affirmed.

Affirmed.

1947-1948: The Committee on the Status of Women in the
Government

GEN. NO. 9983

AGENDA NO. 13

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1944

MICHAEL WEINHOUSE,)
APPELLANT,)
vs. : APPEAL FROM THE CIRCUIT
FREDERICK W. WOODRUFF,) COURT OF WILL COUNTY.
ET AL.,)
APPELLEES.)

HUFFMAN, J.

This is a suit by appellant to recover broker's commission for sale of personal property, consisting of the hotel furnishings and equipment in use in the operation of the Woodruff Hotel in Joliet, and the securing of a tenant for said premises. The complaint consisted of two counts. In the first count, the Joliet Hotel Company, a Corporation, Anna Schoene, individually and as Executrix of the Estate of Paul Schoene, Deceased, were defendants. In the second count, Frederick W. Woodruff was sole defendant. At the close of the plaintiff's evidence, motion by defendants named in the first count

17. 12. 1938

THE PROSECUTOR GENERAL

TO THE COURT

IN THE MATTER OF

THE PEOPLE

VS.

THE DEFENDANT

THE PEOPLE

VS.

THE DEFENDANT

VS.

THE PEOPLE

VS.

THE DEFENDANT

This is a case of

the People vs.

the People vs.

the People vs.

the People vs.

the People vs.

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the People vs.

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for directed verdict was granted. This left standing the second count with appellee Woodruff as defendant. The jury returned a verdict in favor of said defendant. Appellant makes no argument against the action of the trial court in directing a verdict for the defendants named in the first count. Therefore, our consideration shall be directed toward the case as it went to the jury under the second count.

It is claimed by appellant in his complaint, that he was a licensed real estate broker, engaged in business activities incident to such line of endeavor; that during the months of June and July, of 1942, he negotiated with appellee Woodruff to the end that he might represent said Woodruff as his broker and agent for obtaining a purchaser for the personal property and furnishings located in the Woodruff Hotel, in the City of Joliet, and also in obtaining a new tenant for said hotel; that appellee Woodruff claimed to be the owner of the hotel furnishings and equipment; and that he did retain appellant to represent him with respect to making sale of such personal property, furnishings and equipment, and for the procuring of a new tenant for the premises. Appellant avers that pursuant to such contract of agency, he made numerous business trips from Chicago to Joliet, and brought several prospective purchasers and lessees to interview appellee Woodruff; that during such period of negotiations, Woodruff did accept the offer of one

for director, which was the first time the
second court with appellate jurisdiction was
jury returned a verdict in favor of the defendant.
Appellate court was then in session for the first time
trial court in Chicago, and the first time in Illinois
named in the Illinois Constitution, and the first time
shall be heard by the court, and the first time
under the second court.
It is a well known fact that the first time
was a limited, and certain number of cases were
actively engaged in the trial of the case, and during
the period of the trial, the first time in the
appellate court, the first time in the appellate court
Woodruff as a trial judge and as a trial judge in the
for the first time in the appellate court, and the first time
Woodruff as a trial judge, in the trial of the case, and the first time
ing a new court, for the first time in the appellate court
claimed to be the owner of the land, and the first time
ment, and the first time in the appellate court, and the first time
with respect to the trial of the case, and the first time
mishaps and difficulties, and for the first time of a new tenant
for the first time. Appellate court was then in session for the first time
first of all, and made numerous business trips from Chicago
to Illinois, and brought several important business and
leases to interview appellate Woodruff; that during such
period of negotiations, Woodruff did accept the offer of one

of said prospects; that a deal such as had been contemplated was consummated as a result of the efforts of appellant; and that appellee Woodruff promised and agreed to pay to appellant the sum of \$2500, as a fee and commission for his services rendered in connection with such sale.

Appellee Woodruff by his answer specifically denied each averment of the complaint charging him with liability. He also filed an affirmative defense alleging that appellant, during the entire period when he claimed his services were rendered, had an arrangement with a broker representing one William McNamara, who became purchaser of the property involved and the lessee of the hotel, and that the interests of appellant were adverse to those of appellee Woodruff.

It appears from the testimony of appellant that he heard a report in Chicago, that the hotel in question was for sale, and pursuant to such information, he made a trip to Joliet with a prospective client. His attempt to see any of the parties interested, on this trip, was unsuccessful. The clerk at the hotel advised him he would be unable to see Mrs. Schoene, but that he might see Mr. Woodruff. He thereupon called Mr. Woodruff by phone, acquainted him with his mission, but was unsuccessful in seeing him. Later, he did talk to Mr. Woodruff about the hotel situation. It appears that Woodruff was interested in the hotel building, and that the furnishings and equipment were owned by Mrs. Schoene.

When appellant had his first interview with Mr. Woodruff,

he had in his company a Mr. Basich, whom he presented to Mr. Woodruff as representing a client for the property involved, and that he, appellant, represented Mr. Basich. It appears from the appellant's testimony that he and Basich were representing a Mr. VanNorman as a prospective purchaser of the property.

It is the position of appellee Woodruff that he advised appellant and Basich that he was employing no brokers and paying no brokerage fees; that the hotel equipment and furnishings belonged to Mrs. Schoene; that the purchase price therefor would have to be net to her; and that he, Woodruff, would need no broker or agent with respect to the lease of the hotel building. Appellant admits that Mr. Woodruff advised him and Basich that Mrs. Schoene would employ no broker and pay no broker's commission.

Subsequently, the furnishings and equipment were sold by Mrs. Schoene to a Mr. McNamara with a Mr. Clark representing the purchaser as his broker and agent. Prior to the time of the sale to McNamara, appellant and Clark were in Joliet with Mr. and Mrs. McNamara, and in Mr. Woodruff's office on several occasions, where the proposed sale of the hotel equipment was discussed, prior to the sale thereof. Clark says that at such times, when he and appellant were present with Mr. Woodruff, there was conversation as to Clark's fees that he expected to receive from Mr. and Mrs. McNamara, but that no conversation regarding any other broker's fees or compensation to be paid any one was had

in his presence. He also states that Mr. Woodruff said that any price for the personal property would have to be net to Mrs. Schoene, and that this meant there would be no commission on the sale so far as she was concerned. He further states that after the closing of the deal with Mr. and Mrs. McNamara for the purchase of the personal property involved, and after they had taken possession of the hotel as lessee, he and appellant went over to Joliet and to the hotel to see Mr. and Mrs. McNamara about the fees they had promised to pay him as their broker. He says that in their conversation with Mr. and Mrs. McNamara about his fees, that Mr. McNamara suggested he go to see Mr. Woodruff. Clark denies any knowledge as to why appellant was with him or his purpose in being with him at the time. He states they drove down to Joliet together. He says that pursuant to the suggestion of Mr. McNamara, he went to see Mr. Woodruff about his fees but "did not get very far." He says that Mr. Woodruff told him he didn't have anything to do with the deal. Clark admits he had no claim against Woodruff, and that if appellant had a claim, that he, Clark, did not hear it made. Appellant was with Clark at the time. It appears that Clark claims he was to receive a commission of \$5000, from Mr. McNamara, and that he expected to share a portion of it with appellant. He states he has a suit pending against McNamara to recover such sum as his commission.

Appellant says that he was in the office of Mr. Woodruff

in his presence. He also stated that he was not
that any price or value was placed upon the
be not to him, since of the value of the
be no complaint on the side of the defendant.
He further stated that at the time of the
Mr. and Mrs. [redacted] the members of the
property involved, and after that, the
of the [redacted] [redacted] [redacted]
Joliet and the [redacted] [redacted] [redacted]
the [redacted] [redacted] [redacted] [redacted]
says that he [redacted] [redacted] [redacted]
about his [redacted] [redacted] [redacted] [redacted]
Woodruff. [redacted] [redacted] [redacted] [redacted]
was [redacted] [redacted] [redacted] [redacted] [redacted]
He states that [redacted] [redacted] [redacted] [redacted]
pursuant to the [redacted] [redacted] [redacted] [redacted]
Mr. Woodruff [redacted] [redacted] [redacted] [redacted]
says that Mr. Woodruff [redacted] [redacted] [redacted] [redacted]
do with the [redacted] [redacted] [redacted] [redacted]
Woodruff, and that [redacted] [redacted] [redacted] [redacted]
did not hear [redacted] [redacted] [redacted] [redacted]
It appears that [redacted] [redacted] [redacted] [redacted]
of \$5000, from Mr. [redacted] [redacted] [redacted] [redacted]
portion of it with [redacted] [redacted] [redacted] [redacted]
ing against [redacted] [redacted] [redacted] [redacted]
Appellant says that he was in the office of Mr. Woodruff

in company with Clark, and Mr. and Mrs. McNamara, when the proposed purchase of the hotel equipment was discussed. He states that Clark's connection with the meeting was to get a fee for services from the McNamaras, and that Clark learned about the property being for sale from him.

Mr. McNamara states that at the meeting in Mr. Woodruff's office, in which he and Mrs. McNamara, appellant, Clark, and Mr. Woodruff, were present, that Woodruff stated, "he was not paying any broker any commission either for Mrs. Schoene or for himself." He says that appellant was the first one to bring up the question of commissions, and that he stated the amount of commission he desired, whereupon Mr. Woodruff made the foregoing statement. Mr. McNamara says that Clark and appellant did not seem to be interested in the proposed purchase of the hotel property by him after the above statement by Woodruff respecting payment of commission, and that appellant and Clark soon left. This witness says that he was not represented by anyone as his agent at the meeting; that when appellant proposed payment of a broker's fee and Mr. Woodruff made his statement regarding same, that Clark and appellant left, after which he and Mrs. McNamara talked with Mr. Woodruff. Mrs. McNamara's testimony is substantially the same as that of her husband.

Mr. Woodruff testifies that for some time prior to the transaction involved herein, the hotel was being operated under a month to month lease to the operating company; that

Mrs. Schoene wanted to sell the personal property connected therewith; that from eight to ten real estate brokers came down from Chicago, all trying to secure representation as agent for Mrs. Schoene in selling the hotel property; that he, Woodruff, was interested because he wanted to see a good manager to take charge. He says that appellant and a Mr. Basich came to his office in the early part of July, 1942, stating that they represented a Mr. VanNorman; that their client was interested in the purchase of the hotel property; that the discussion was general; and that nothing resulted from the visit. Appellee denies that he employed appellant as an agent or broker, or that he agreed to pay him any fee or commission in connection with the sale of the property or execution of the lease. He further states that he was advised by VanNorman that he had looked at the hotel, and that he had never heard of appellant. He says that at a later date, appellant, Clark, and the McNamaras came to see him. He says at that time, he advised them he was employing no agent to act in the matter, nor paying any commission. He states that during the period of negotiations with the McNamaras, appellant brought a Mr. Baker to look over the property, but that he did not desire Baker as a tenant of the building, and nothing more came of this prospect.

In connection with the Baker matter, appellant wrote Mr. Woodruff that Baker was interested in the purchase of the hotel equipment and was in position to pay cash for same,

and would take care of the broker's commission. Mr. Woodruff wrote a letter to appellant under date of July 30, 1942, in which he mentioned that Mr. and Mrs. McNamara impressed him as being suitable people to operate a hotel business but that they did not appear to have available funds to complete the transaction. In this letter, appellee stated that the furnishings had originally cost in the neighborhood of \$140,000, and that the personal property involved would include about \$14,000, worth of liquor. In this letter, appellee states, "I am giving you this information in confidence and will ask that you do not construe it to mean that I wish to employ a broker, as I have made it plain to everyone that as far as I am concerned, I have no need for a broker, ****." In the letter from Clark to Mr. McNamara, regarding the deal, written in August, 1942, he states to Mr. McNamara that the owner of the property was looking to Mr. Woodruff to effect a sale of her interests without payment of any brokerage commission; that Mr. Woodruff had stated in their presence that he was not employing any broker, and did not expect to pay any commission in regard to the making of a lease. Mr. Clark calls Mr. McNamara's attention to the fact, "we discussed the matter of brokerage with you and you agreed with us that we could work out the deal and get the property financed, that you would pay \$5000. to us as brokerage commission, ****." Appellee denies appellant solicited or claimed any brokerage fee from him, but that

he did solicit his assistance in aiding him to collect a commission either from Mrs. Schoene, or the McNamaras.

It was indeed a sleeveless errant appellant embarked upon, when he went to Joliet to investigate the report he had heard concerning a proposed sale of the hotel. But we must remember that Woodruff did not send for him. They did not then know each other. Appellant states he made the trip in an effort to see the owner. The clerk at the hotel advised him the owner was not available, and suggested that he might talk to Mr. Woodruff. He called Mr. Woodruff by phone, acquainted him with his mission, but was unsuccessful in seeing him that day. According to appellant's testimony, the first time he saw Woodruff, he had Basich with him and says that he advised Mr. Woodruff that Basich had a client who wanted to buy, and that he, appellant, represented Basich. This certainly was not a representation of Woodruff by appellant. Subsequent events do not tend to prove the creation of agency between them, as claimed by appellant.

Appellant argues four points for reversal. The first and third have to do with alleged improper remarks made by appellee's counsel to the jury. The remarks are not preserved in the record and therefore cannot be considered. Furthermore, appellant in his argument with reference to the remarks, admits that no objection was made thereto.

The second point argued has to do with cross-examination of appellant's witness, Clark. This witness was asked

if he did not then have pending a suit against the McNamaras for commission arising out of the same transaction as involved in this suit. The undisputed evidence in this case shows that Clark and Appellant were together at the times involved in the negotiations of the McNamara transaction. The evidence fairly discloses upon their part a joint effort to effect a consummation of this deal. One of the defenses set up by Woodruff was that Clark and appellant were to divide brokerage fees received. Under the circumstances, we do not consider the admission of this evidence error. It went to the credibility of the witness, and if a division of fees was anticipated by Clark and appellant, the interest of the witness in this suit was proper for the consideration of the jury in judging the weight and credibility of his testimony.

It is next argued the court erred in permitting introduction of a portion of a written statement made by Basich. It was submitted to him upon his examination in chief, as a witness for appellant, for his identification as to the instrument and his signature thereto. He readily admitted the instrument as being one signed by him. When appellee presented his case for the consideration of the jury, a certain portion of this instrument was introduced. It stated that Basich and appellant were co-brokers representing VanNorman at the time they visited appellee. This in a way was impeachment to the witness's testimony, as on the trial he took the position that he represented VanNorman, and

appellant represented Woodruff at such meeting. Appellant testified that Basich represented VanNorman, and that he stated to Woodruff that he represented Basich. Before the court admitted the portion of the statement, he stated that it was done so with the express understanding that appellant might recall the witness to further examine him with reference to such statement and afford him full opportunity of explaining same. This appellant did not do. The defendant-appellee could not have well offered the exhibit in evidence until the time came for the presentation of his side of the case. However, appellant in his brief and argument and on page five thereof states that for the purpose of this appeal, he waives his objection to the procedure in connection with said exhibit.

The above points constitute those argued by appellant. The court perceives no error in connection with any of them.

Appellant by his third assignment of error, complains of instructions given on behalf of appellee and the form of verdict. There are no instructions given on behalf of appellee in the abstract, and none in the brief. No argument is made regarding instructions given on behalf of appellee. However, the verdict does appear in the abstract. It is as follows:

"We, the jury, find the defendant,
Frederick W. Woodruff, not guilty."

Although appellant makes no argument against the form of verdict, yet in that portion of his brief entitled, "Propositions of Law and Authorities," and under the third point thereof, he states that the use of "not guilty" verdicts

in civil actions, not founded on tort, are highly prejudicial against the other party litigant. In connection with this statement, appellee says he has not been able to find any law on the point involved.

A verdict is the expressed decision of a jury, reported in court, on the matter submitted to them upon the trial of the case. It is but a step in the cause, to be construed and applied reasonably in the light of all the proceedings. The verdict in this case is what is termed a general verdict, which is one whereby the jury pronounces generally upon all of the issues, in favor of either the plaintiff or defendant. Such a verdict is considered to determine all the material questions of the controversy, in favor of the party for whom it is rendered. The presumption is, that the verdict of a jury, is based upon a consideration of the matters in controversy presented upon the trial, and its verdict is generally considered to be as broad as the issues upon which they are required to find.

Verdicts are not to be taken strictly like pleadings. Where a verdict is responsive to the issues, it is considered sufficient to support a judgment, if under the circumstances, the court can without effort or doubt collect the meaning of the jury. And the form of a verdict is, in general, held sufficient if it expresses the intent of the jury so that the court can understand it. *Western Springs Park District v. Lawrence*, 343 Ill. 302, 310; *Bacon v. Schepflin*, 85 Ill. App. 553; *McGill v. Rothgeb*, 45 Ill. App. 511; *Atlantic Ins.*

Co. v. Wright, 22 Ill. 462, 473; Hartford Fire Ins. Co. v. Vandusor, 49 Ill. 489, 492; Radfield v. People, 146 Ill. 660; Chittenden v. Evans, 48 Ill. 52.

Formal defects in a verdict should be objected to at the time the same is returned. They cannot be urged for the first time on appeal. Schlencker v. Risley, 3 Scam. 483, 488; 38 Am. Dec. 100; State Bank v. Batty, 4 Scam. 200, 202; Davis v. People, 50 Ill. 199; Rund v. Bostrom, 227 Ill. App. 186, 192.

In the construction of a verdict, the first object is to learn the intent of the jury. Here we have but one count, with one plaintiff, and one defendant. When the verdict of the jury is considered in the light of the pleadings, and the point in controversy between the parties, it can only be construed to mean that they had found the defendant was not obligated to the plaintiff, as by the plaintiff charged. Such is the clear and manifest intention of the jury as expressed by its verdict, and the court properly entered judgment thereon.

The judgment is therefore affirmed.

Since the judgment is affirmed, appellee's motion to dismiss the appeal has not been considered.

Judgment affirmed.

Co. v. Wright, 29 Ill. App. 401; Chicago v. The People, 100 Ill.

Verdict, 49 Ill. App. 400; and Chicago v. The People, 111 Ill.

660; Chicago v. The People, 111 Ill. 421.

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Davis v. The People, 111 Ill. 421; Chicago v. The People, 111 Ill.

100, 101.

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by its verdict, the case was argued for

The judgment is therefore affirmed.

Since the judgment is affirmed, appellee's motion to

dismiss the appeal has not been sustained.

Judgment affirmed.

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AGENDA NO. 15

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1944

1033

HENRY J. HOYT,
APPELLEE,

vs.

GRUNDY SERVICE COMPANY,
AN ILLINOIS CORPORATION,
and EARLYN HILL,
APPELLANTS.

APPEAL FROM THE CIRCUIT
COURT OF GRUNDY COUNTY.

HUFFMAN, J.

This is an action by appellee against appellants to recover for damages to his person and property occasioned by collision between an automobile driven by him, with an oil truck driven by appellant Hill. The defendants jointly denied negligence on the part of the driver of the oil truck, denied that said truck was the property of the defendant, Grundy Service Company, and that the said defendant Hill was then engaged in or about the business of said Service Company. They further denied that defendant Hill was an employee,

agent or servant of the Service Company. Trial resulted in verdict for appellee, and against appellants, in the sum of Forty-four Hundred Dollars. The defendants bring appeal from judgment rendered thereon.

It is the position of appellant Service Company that the court erred in not granting its motion for directed verdict, submitted at the close of plaintiff's evidence and again at the close of all the evidence. This position is predicated upon its contract between it and its salesman which instrument is entitled, "Uniform Truck Salesman's Agreement." The Service Company urges that under and by virtue of the terms of this contract, the defendant Hill was an independent contractor, and not an agent thereby of the Grundy Service Company, which was a company engaged in the sale and distribution of gasoline, motor oil, and associated products. The salesman's agreement between the Service Company and Hill is in evidence. Appellant Service Company lays much stress upon the similarity in context between its contract and that involved in the case of Jones v. Standerfer, 296 Ill. App. 145. In this connection, pertinent reference might be had to the case of Darner v. Colby, 305 Ill. App. 163, also reported in 375 Ill. 558. A comparison of the agent's or salesman's contracts involved in the two above cases and the one at bar will disclose a striking similarity. The fundamental purpose and design of such contracts are the same. This

agent or servant of the service company, and is
in verdict for appellee, and against appellant, in the
sum of one hundred dollars. The service company
appeal from judgment reversed.
It is the opinion of appellant that the company
that the court could not reach the decision for
circled verdict, committed an error of law in its
evidence and award of the case of all the evidence.
This position is contradicted upon the contract between it
and its salesmen which were as entitled, "Wholesaler"
The contract was a contract. The service company under
that upon the terms of the terms of this contract,
the defendant will be an independent contractor, and not
an agent thereof of the service company, which was
a company engaged in the sale of distribution of gasoline,
motor oil, and associated products. The sales and three-
ment between the service company and appellant is in evidence.
Appellant service company says, upon these facts, the similar-
ity in context between the contract and that involved in
the case of Jones v. Stansbury, 200 Ill. App. 143. In
this connection, appellant's position is in line with the
case of Turner v. Colby, 303 Ill. App. 183, also reported
in 375 Ill. 556. A comparison of the agent's or salesmen's
contracts involved in the two above cases and the one at
bar will disclose a striking similarity. The fundamental
purpose and design of such contracts are the same. This

necessarily requires inclusion of similar terms, conditions and subject matter, with a resulting similarity of language used.

Appellants also assign as error, the giving of plaintiff's instructions two and nine. Each of these instructions directed a verdict and authorized a recovery generally, without limiting the negligence to that charged. We find no given instruction by plaintiff advising the jury as to the negligence or wrongful conduct charged. Under such circumstances, the giving of such instructions is error as it permits the jury to go outside proper limits. *Seybold v. Zimmerman*, 294 Ill. App. 138, 143; *Rasmussen v. Wiley*, 312 Ill. App. 404; *Garnhart v. Reeves*, 288 Ill. App. 159.

As a third ground of reversal, appellants urge that the verdict is excessive. Due to the fact the judgment is to be reversed and the cause remanded because of the giving of plaintiff's instructions two and nine, we do not deem it necessary to consider this objection.

For the reason above indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

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